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MISSISSIPPI LAW JOURNAL

JOURNAL of the MISSISSIPPI STATE BAR

VOL. VI DECEMBER, 1933 No. 2

JUDICIAL ADMINISTRATION IN MISSISSIPPI

P. S. Sikes, Ph.D.*

I. The Inferior Courts

The so-called inferior courts in the judicial system of Mississippi consist of the justice of the peace court, found throughout the state, the municipal courts in the incorporated places, and the county court in certain counties. The first two will be studied here; the county court has been treated already.[1]

Because of limited space very little attention can be given here to the organization, jurisdiction, and selection, legal qualifications, compensation and removal of judges of, and provisions for appeals from, the courts under consideration.[2]

Justice of the Peace Court. The law provides for the election every four years of from two to three justices of the peace in each of the five supervisors' districts into which every county is divided.[3] However, in each of many districts there is only one, or even no, justice of the peace elected and qualified under the law. Any qualified elector who has resided in a district at least two years is eligible to the office. A justice is required to hold one or two regular terms of court in his district each month. The court of a justice of the peace has jurisdiction to try ordinary civil actions involving a principal sum of not more than $200, and criminal cases less than felony. A justice of the peace may also act as a committing magistrate in felony cases, perform marriage ceremonies, take acknowledgements, and perform certain other func-

* Assistant in political science in the University of Illinois.

[1] See Mississippi Law Journal, IV, 162-80, February, 1932.

[2] This and succeeding articles to be presented are based upon a thesis prepared by the writer while a graduate student in the department of political science of the University of Illinois. For obvious reasons it will be necessary to exclude much of the detailed material contained in the original study.

[3] Under a recent statute the legal minimum number of justices in each dictrict will be reduced to one and the maximum to two beginning in January, 1936. *General Laws of Mississippi,* 1932, 475.

tions of a judicial or administrative nature. Appeals from judgments of the justice of the peace court may be taken to the circuit (or county) court by either party in civil actions or by the defendant in criminal cases. Justices are compensated by fees. There is no method provided by which a justice of the peace may be summarily removed from office.[4]

In order to get a clearer idea of the nature of the work being done by the justice of the peace court the writer examined the dockets in Forrest county for the year 1930, noting the nature of the cases and the disposition made of each case. Casual examinations of dockets in several other counties in different parts of the state indicate that the data secured and given below are fairly typical of the entire system. The civil dockets of seven justices of the peace in Forrest county showed the following cases filed during the year 1930.[5]

Actions on open accounts	409
Actions for the collection of rent or for the ouster of tenants	62
Actions in replevin	46
Proceedings in garnishment	35
Suits on promissory notes	33
Suits for the collection of wages	18
Writs of seizure	17
Damage suits	8
Suits for the collection of "bad" checks	7
Attachment of property	1
Total	636

It will be observed that by far the greater part of the civil cases coming before the justices of the peace in this county—about two-thirds in fact—were for the collection of open accounts. If we take all cases having to do with the collection of money—accounts, notes, wages, checks, etc.—over ninety per cent of the total number will be included. Thus there seems to be some justification for the often heard cynical remark that justice of the peace courts are merely legalized collection agencies. This observation is not alone sufficient to condemn the courts, because it is not denied that it is the duty of a state to furnish some agency through which just debts can be forcibly collected.

The following data show what action, if any, was taken on the above described cases, or what disposition was made of them:[6]

[4] The material in this paragraph is based primarily on the *Constitution of Mississippi,* 1890, sec. 171; and the *Mississippi Code,* 1930, Ch. 41.

[5] There were actually eight justices of the peace in this county but the docket of one justice, a comparatively large docket containing over one hundred civil cases, was so poorly kept that it was impossible to use it in this compilation.

[6] The disparity between the totals in this table and the one above results from the "joint parties" in certain cases.

Judgment for the plaintiff (by the court)	355
Settled by the parties	90
Dismissed at defendants' costs	59
Dismissed upon payment of costs by plaintiff	35
No return shown on process	20
Jury verdict for plaintiff	9
Dismissed	7
Jury verdict for defendant	4
Non-suit taken by plaintiff	4
Defendant not found	2
Judgment for defendant (by the court)	1
No disposition shown	56
Total	642

Another cynical remark heard with reference to the court of the justice of the peace is that "J. P." stands for "judgment for the plaintiff." The data in the last paragraph above seem to indicate that there is some justification for this remark. Of the 564 cases disposed of, 364 were "judgments for the plaintiff," and fifty-nine other were disposed of in such manner that the defendants were required to pay the court costs as the price of the dismissal of the actions; while only five cases were decided directly in favor of the defendants. Where judgments were rendered the plaintiffs won ninety-eight per cent of the time. However, it should be pointed out that in a very large part of the cases the plaintiffs won as a result of default judgments. Incidentally, appeals were taken in only nine of these cases.

We turn now to the criminal cases docketed by seven justices of the peace in Forrest county during the year 1930. There were 987 distributed as follows:

Assault, or assault and battery	90
Gambling	80
"Beating board bill"	71
Petit larceny	57
Possessing intoxicating liquor	53
Unlawful cohabitation	50
Drunkenness	40
Profanity	26
Trespassing	21
Disturbance (usually of a family)	17
False pretense (worthless checks in most cases)	270
Miscellaneous (including felonies, operating car without proper lights, brakes, signal devices, or licenses, malicious mischief, etc.)	212
Total	987

These cases were disposed of as shown in the following table:[7]

Plea of guilty entered	225
Settled upon payment of checks, board bills, etc., and the costs of court	146
Adjudged guilty by court or jury	94
Adjudged not guilty by court or jury	84
Dismissed for lack of sufficient evidence	59
Prosecution dropped by affiant	39
Dismissed upon payment of costs	38
Summarily dismissed or "nol prossed" by court	38
"Bound over to grand jury"	12
No return shown on warrant	255
Total	990

It is believed that the cases coming before the justices of the peace in this county are fairly typical of the criminal cases coming before justices in the state as a whole, and that the disposition of the cases offers a fair sample of the methods used in disposing of such cases in other parts of the state by the justice of the peace courts. A feature of the court not revealed by these data but nevertheless in evidence in the court of most justices of the peace, is that cases are, as a rule, disposed of speedily.

Attention thus far in this investigation of the justice of the peace court has been directed principally toward the constitutional and statutory provisions relative to this court and the general nature of its work. It is the purpose now to examine more closely some of the records of the court, and also other material, for the purpose of evaluating its work and to suggest possible reforms, if such seem to be needed.

Perhaps one of the most nearly universally condemned features of the justice of the peace court is the fee system of paying the justices.[8]

[7] The difference in totals in the two columns dealing with criminal cases results from the fact that in some cases there were two or more defendants. It is not contended that these data are typical of the number, and methods of disposition, of cases coming in the justice of the peace courts. We do believe that they serve to show the general nature of the work done in this court, considered as a whole.

[8] Chancellor Kent wrote in this connection: "It is requisite that the courts of justice should be able, at all times, to present a determined countenance against all licentious acts; and to deal impartially and truly, according to law, between suitors of every description, whether the cause, the question or the party be popular or unpopular. To give them the courage and the firmness to do it, the judges ought to be confident of the security of their salaries and station." *Commentaries,* I, 359; for comments on the fee system as applied particularly to the justice of the peace courts see Blewett Lee, *"Tumey* v. *Ohio"* (a comment), *American Bar Association Journal,* XIII, 359 (1927); W. F. Dodd, *Illinois Constitutional Convention Bulletin,* No. 10, 763-67; and "The Constitutionality of the Fee Compensation for Courts" (editorial comment) *Yale Law Journal,* XXXVI, 1171-75 (1927).

The principle has been declared contrary to the "due process" clause in the fourteenth amendment to the constitution of the United States.[9] But with the provision in Mississippi for paying each justice of the peace a maximum amount of sixty dollars a year, from the public treasury, in cases in which the state loses, the fee system as used in the state seems not to be, technically at least, contrary to the "due process" clause.[10]

In theory the provisions of the laws concerning fees in civil cases seem equitable as well as constitutional, since fees are ordinarily assessed against the losing party, but in actual practice their equitableness is not so apparent. It is a well known fact that in many cases coming before the justices of the peace there will be no fees demanded unless the plaintiffs win. The law does not require that fees be collected, and it may often be "good business" on the part of the justices not to require their best "customers" to pay when they lose their suits or fail to collect any money. When such is the case it is clear that the judge is not a disinterested one. Even if it were the general practice of the justice to demand all fees in every case, it would often be impossible to collect the fees simply because the losing parties would have no money with which to pay, nor any property against which an execution would issue. In a case then, in which one party is able to pay the costs of court and the other is not, the only way for the justice to get any pay is to decide against the more able party. It appears that, regardless of what the actual practice may be in cases of this kind, the justices are not without interest in the outcome.

Some of the practices of the court in respect to the collection of fees are interesting. The records are, on the whole, very poorly kept with respect both to the disposition of cases and the collection of fees, but it does not take an expert accountant to detect irregularities in the fee bills of almost any justice of the peace. A few random examples will serve to illustrate the nature of the most common irregularities.

On March 12, 1930, an affidavit was sworn out before a justice of the peace in district five of Forrest county.[11] Passing a worthless check for a small amount was the offense charged. The usual warrant for the accused was issued, but apparently no arrest was ever made as no return was shown on the warrant. On December 13, 1930, the case was dismissed as a "state failed" case. The following fee bill was made up for collection from the county:

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[9] *Tumey* v. *Ohio,* 273 U. S. 509 (1926).
[10] *Hitt* v. *State,* 149 Miss. 718 (1928).
[11] *Criminal Docket,* Justice of the Peace, district five, Forrest county (Miss.), 1930.

Fees for the J. P.		Constable's Fees	
Issuing warrant	$ .75	Serving warrant	$1.50
Entering suit	.50	Taking bond	.75
Proceeding to judgment	.50	Attending trial	.40
Entering judgment	.50	Returning process	.50
Affidavit	.50		
Total	$2.75	Total	$3.15

It is indeed difficult, from the record in this case, to show why the justice of the peace should have received all the fees shown in his bill and why the constable should have received any at all.

The most common fee bill in criminal cases in the justice of the peace court is that given in the case above. An observation that appeared to the writer as being interesting, if not reason for arousing suspicion, was the nature of the fee bills in the docket book of a justice in district three of Forrest county during the years 1930 and 1931.[12] The fees for the justice of the peace rather consistently totaled $2.75 in each case from the beginning of the year until September 26, 1930, the day on which a subcommittee of the grand jury examined the docket. From the latter date until April 11, 1931, the day on which another grand jury subcommittee examined the docket, the fees just as consistently totaled $3.25 in each case. A charge for a "certificate" accounted for the extra fifty cents in each bill. After the last date, the fee bills were again consistently $2.75 each. So far as the records show, there was no justification for this apparent inconsistent practice, but nothing was said about it in the grand jury reports.

In many of the dockets of the justices of the peace fee bills are not regularly itemized, but where they are it is often a very simple matter to detect instances of illegal charges and collections of fees. Probably the most common example of this practice is a charge of seventy-five cents (in the constable's fee bill) for the making of an appearance bond. There are no doubt many other over-charges made but this particular kind is the most easily detected. Numerous cases were observed in many different counties in which such a charge was made in each case, but in which the records showed that the defendants were brought directly into court after being arrested, were immediately tried or allowed to plead guilty, and that they paid their fines and costs without any occasion for the making of appearance bonds.

Many other specific examples of questionable practices in connection with the fees charged in the justice of the peace court could be cited. However, since an exposure of such practices in the court of certain justices of the peace is one of the features of certain official and semi-

[12] *Ibid.*, district three, 1930-31.

official reports to be immediately taken up, no additional examples will be given here.

The condition of the dockets kept by the justices of the peace indicates that there is need for a more thorough supervision of the work of these officers. The justices are required to make monthly reports of fines collected to the county auditor.[13] Apparently, little notice is taken of these reports.[14] Justices generally bring their dockets into circuit court at each term at which there is a grand jury sitting. Since one of the duties of the grand jury is to examine the official records of the county, the dockets are presumably brought in for examination by that body.

This form of supervision of the work of the justice of the peace court is obviously inadequate. In most counties visited by the writer there are, apparently, never any examinations of the dockets made by grand juries. In a few counties, however, the grand juries make regular examinations of the criminal dockets—necessarily in a hurried fashion —and often comment upon the conditions of the dockets in their reports, or on rare occasions, return indictments for certain alleged illegal practices disclosed in them. But the inadequacy of such supervision can be shown by quoting excerpts from the reports of grand juries over a period of years in Forrest county. In a report in 1916 this statement is made:[15]

> "We have examined the dockets of all the justices of the peace in the county and few of them are found to be well kept and all cost bills regularly itemized on the docket and found that all the money collected by the justices of the peace in the way of fines have been properly reported. We regret to report, however, that we found the following dockets in the following conditions: S. B. Randall, of beat three, fails to list cost in certain cases; in one case he fails to make a charge. We find that J. B. Clark, beat number three, has tried something over one hundred cases but he has turned into the county treasury only forty-eight dollars and find that in a great many cases the defendant was found guilty but the fine was suspended upon payment of costs. L. M. Runnels, district number two, has tried twelve cases, convicted ten, had two appeals, and fined seven defendants one cent each and costs, and that T. J. Pittman, beat one, has tried about one hundred cases and suspended sentence in a majority in which the defendant was convicted, and fails to keep proper cost bills on docket. We find that J. G. Fairley, beat number two, has a great

[13] *General Laws of Mississippi,* 1932, 497. Until 1932 these reports were required only semi-annually.

[14] Some auditors (chancery clerks) who were asked about these reports were either ignorant of the requirement for making them, or were unable to locate them in their offices.

[15] *Minutes, Circuit Court,* Forrest county (Miss.), Book 5, p. 36 (1916).

> many suspended sentences and fails to keep a record of cost bills. We have not returned any indictments against the justices of the peace, for the reason that we did not find sufficient evidence to convince us that they had wilfully or corruptly failed to keep within the strict letter of the law; and were advised that we could not indict them for suspending sentences without the aforesaid element controlling their act."

The old adage, "Ignorance of the law excuses no one" evidently does not hold for the justices of the peace. It must be shown that their acts of malfeasance in office were done willfully—hence knowingly—before they are indictable offenses. Under such circumstances it is difficult to see how there can be any proper supervision of their work by this method. Two years after the above report was made another grand jury reported, with reference to the same justices and others of the county, as follows:[16]

> "We have examined all the justice of the peace dockets and we find them very well kept, and all money collected by them accounted for. We want to congratulate the justices of the peace for the manner in which they have enforced the law and believe that we have a very high class justice of the peace in this county."

It appears that the justices who were believed to be woefully corrupt in 1916, had become model jurists two years later. But by 1919 some of these model judges appear to have "back-slidden" for we find a grand jury reporting thusly:[17]

> "We have examined the dockets and reports of the various justices of the peace and find them reasonably well kept. In several instances we have found some small fines which appear to have been imposed and collected which do not appear upon their October report of money collected. We find that some of the justices of the peace do not keep their dockets properly written up, that is to say, that judgments are not always properly entered so as to show the final disposition of the case."

In order further to show the chameleon-like nature of the records of the justices of the peace, or the unreliability of the grand jury reports, we quote from five different reports rendered during the years 1921, 1922, 1923. These reports involved the same justices of the peace, but not necessarily the same that were involved in the reports quoted from above. In a report submitted in May, 1921, this statement is found:[18]

> "There is much complaint in reference to some of our justices of the peace and we are sorry to report that we find some of these

[16] *Ibid.*, p. 438 (1918).
[17] *Ibid.*, Book 6, p. 33 (1919).
[18] *Ibid.*, Book 7, p. 39 (1921).

> complaints not altogether without foundation. We find some of the dockets of the justices of the peace well kept and in some instances they have wholly failed to make an itemized record of the costs of cases tried in their courts. We have not had before us any evidence tending to show any money has been misappropriated but the failure of some justices of the peace to keep an itemized statement and record of costs in all cases furnishes a good ground for criticism."

Six months after the above report was made "justices of the peace records were examined [by a grand jury] and found to be well kept and all money properly accounted for."[19] And still four months later a grand jury was "convinced that there is [was] a long standing practice of some of the justices of the peace and constables to assess fines against defendants and accept payment on the installment plan in violation of the law."[20] In October, 1922, the records of the justices of the peace in the county so far as the grand jury was "able to ascertain," were "in good condition";[21] and in April 1923, they were reported "in the main properly kept and fines and forfeitures accounted for."[22]

Thus it is that over a brief period some of the records of the justices of the peace in this county furnish "good ground for criticism", all "were properly kept and all money properly accounted for", some showed acts done "in violation of the law", all appeared to be "in good condition", or were "in the main properly kept", as reported by successive grand juries.

In April 1925, a grand jury in the same county made the following observation in its report:[23]

> "It is noted by this grand jury that judge J. A. Myer has entered upon his dockets many persons charged with gaming and later discharged them finding them not guilty, but assessing them with the costs of court. This grand jury fails to understand the liability of persons for costs where they are found 'not guilty' in our courts."

What was done about these alleged cases of extortion? The statement of the grand jury, along with the rest of its report, were read in open court, quite likely to an almost empty courtroom. The justice himself was probably not present, and it is possible that he never knew of his condemnation at the hands of the grand jury. To say the least, this particular justice is still serving the people of his district in the same office.

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[19] *Ibid.*, 147 (1921).
[20] *Ibid.*, 270 (1922).
[21] *Ibid.*, 403 (1923).
[22] *Ibid.*, 549 (1923).
[23] *Ibid.*, Book 8, p. 32 (1925).

The climax to these various reports of the grand juries was probably reached in April 1929, at least in so far as they applied to justices of the peace. For several months before the April term of circuit court in Forrest county, a bitter editorial campaign against official corruption in the county was waged by the *Hattiesburg American,* a daily newspaper of Hattiesburg, the county seat. Many acts of alleged malpractice and extortion by certain justices of the peace and other officials of the county were charged. The Forrest County Bar Association was aroused and it appointed a committee of its members to investigate some of the alleged violations of the law. This committee, consisting of seven prominent members of the bar of the county, made a somewhat full investigation and detailed report of the records and practices, *inter alia,* of two justices of the peace and a constable of the county (and city of Hattiesburg). Many of the findings and conclusions of this committee are still applicable, in varying degrees, to some of the justices of the peace in this and other counties of the state. On the whole, the report presents in a striking manner some of the principal defects of the justice of the peace court and it is believed copious quotations from it are justifiable at this point.[24]

"Malfeasance in Office in the Case of A. H. Owen, Justice of the Peace, Beat One, Forrest County, Mississippi.

"A. We found more than a dozen cases during the month of March 1929, where men were taken into custody by J. W. Phillips [a constable] and charged in Justice of the Peace Owen's court with trespass on the right-of-way of the New Orleans and Northeastern division of the Southern Railway. The case of F. L. Windham, case No. 59, on page 59 of the current docket of justice of the peace Owen, is typical of this entire group; Windham was charged with trespass by J. W. Phillips, who made affidavit before the justice of the peace Owen on March 16, 1929. The plea of 'guilty' is shown on the docket as is a judgment sentencing the defendant to pay a fine of ten dollars and costs, which amounted to $10.90 as follows: Fees of justice of the peace Owen $4.40; fees of the sheriff $3.65; witness fee of J. W. Phillips $1.00; jail fee $1.60; commitment fee $.25.

"Your committee finds that none of the alleged misdemeanors occurred within the jurisdiction of A. H. Owen; the right-of-way of the Southern Railroad is entirely within beat three of Forrest county and no part of said right-of-way is within beat one where justice of the peace Owen exercised jurisdiction to try this and numerous other similar cases when he must have known that each of the men brought before him on this trespass charge was a stranger with no knowledge whatsoever respecting the subdivisions of the county or the jurisdiction of the officials. In the opinion

[24] This report was not published but the writer secured a copy from the secretary of the committee.

of the committee it is extremely doubtful whether some of the men who were sentenced were fully advised as to the charges against them.

"Your committee attaches hereto a certificate from A. H. Owen, justice of the peace, filed herewith as an exhibit, in which he states under seal of his office that one justice of the peace affidavit charging F. L. Windham with trespass was filed in this case, said affidavit being the only legal paper ever issued by him or even in his possession in connection with the Windham case. We respectfully call your attention to the fact that a charge of seventy-five cents was made for issuing a warrant of arrest when the certificate of Owen himself shows that no such warrant was ever issued or was ever in his possession among the files of this case. You will note that a charge of forty cents was made for issuing a subpoena for one witness, but according to his own certificate no such subpoena was ever issued or was ever in his possession among the files of this case. You will note further that no charge was made for summoning a witness. It appears that seventy-five cents was added to the defendant's costs in this case for taking a bond, although no bond was ever made in this case. The official records show that he was never out of the county jail or away from the convict camp except for the few moments that he was in the office of justice of the peace Owen. It further appears that a charge of forty cents was made for attending trial in the justice of the peace court, although we find no evidence that anyone except J. W. Phillips the accusing witness, attended the trial.

"Your committee is of the opinion that the certificate furnished to the committee by the justice of the peace himself, together with the costs listed on the docket, shows a clear case of extortion. Several other cases were tried on the same morning, the cost bill in each case being the same. Our comments on the one particular case are applicable to the others."[25]

The committee describes similar and equally flagrant cases of alleged extortion by another justice of the peace and a constable, both of Forrest county and of the city of Hattiesburg, and concludes its summary of findings with this observation:

"Your committee finds that after persons, most of whom are strangers, have been arrested, brought to the police headquarters and tried in the city court on the charge of being a suspicious and dangerous character and have served a jail term of from three to five days, fee grabbing officers attached to the justice of the peace courts of the county are on hand when the doors of the city jail opens to pounce upon these unfortunate individuals, take them to certain justice of the peace courts of the county, try these men

[25] There were in fact ten such cases tried this same day. Each fee bill showed a payment of one dollar to J. W. Phillips, as a witness, in spite of the plain injunction of the law against the payment of more than one witness fee, or the amount of one day's fee, to a witness for attendance in court one day regardless of the number of cases in which he is a witness.

> afresh on some such charge as vagrancy or trespass, enter a plea of guilty or find them guilty after a hearing of the most informal or irregular character and sentence them to the county road. We were shocked at the number of instances where men whom the city judge sentenced for nothing more serious than being suspicious and dangerous characters, who were sentenced on two charges in the justice of the peace courts, the costs in such cases ranging from eighteen to twenty-one dollars."

The committee made its report at what might reasonably be considered an auspicious time for such a document to appear—the week before the convening of a regular term of circuit court in the county, and the consequent sitting of the grand jury. After a stormy week of investigation, the grand jury returned ten indictments for extortion and one for profanity against justice of the peace A. H. Owen and four for extortion against constable Daugherty as well as several for extortion against other justices of the peace and constables of the county.[26] Later in this same term of court when the cases against Owen and Daugherty came on for hearings, the defendants respectively moved to have the indictments quashed on the ground that "undue influence was brought to bear against the grand jury." The motions were sustained by the trial court and all indictments against these defendants were quashed, and the action sustained by the supreme court.[27] The other cases were never brought to trial.

The evidence in the above cases seemed convincing.[28] The grand jury at the April, 1929, term of circuit court seemed bent upon having a little house-cleaning in the justice of the peace court.[29] A public-

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[26] *General Docket,* Circuit Court, Forrest county (Miss.), April 1929. The storminess of this session of the grand jury is indicated by the following testimony of the district attorney in the trial court's proceedings in the Owen case: "I came here Monday morning; there was a great deal of feeling around the courthouse, and I realized that things had to be handled carefully. I also had read the papers and read about the committee's report. . . There had been some talk—and I say this frankly—and it had gotten into the grand jury room in the minds of one or two, that D. W. Holmes, county prosecuting attorney of Forrest county, and I, as district attorney, were opposed to any indictment; when that came to my knowledge, I threw the grand jury door open. . . The indictments . . . were voted on Monday morning [of the second week] . . . and returned into open court about five P. M. as well as I remember. The report here to the Bar Association was discussed freely in the grand jury room." Quoted in *State* v. *Owen,* 156 Miss. 487 (1929), at 493.

[27] *State* v. *Owen,* cited *supra,* note 26.

[28] An attorney for the defendant Owen said in his appeal brief: "How much, how little, or whether any evidence was before the grand jury we did not inquire or could we. If we have shown that improper influence was introduced into the grand jury room, then it makes no difference whether there was competent evidence sufficient to justify the indictment or not." Brief of R. L. Bullard, in *State* v. *Owen,* cited *supra,* note 26.

[29] The grand jury which returned the indictments mentioned in the above discussions made the following comment upon them: "We have brought in several indictments against several different parties, and would have returned in-

spirited county prosecuting attorney or district attorney, even after the first reversals, could have rendered a real service to the county by properly marshaling the facts and testimony in certain of these cases and presenting them to the grand jury in an acceptable manner at the following term of court. How well this was done can be surmised from the nature of the report of the grand jury at that term of court. The law enforcement officers were thanked "for the efficient work they were carrying on" and the records of the justices of the peace were reported as being "neatly kept and correct."[30] Anyone who examines the records of certain of the justices of the peace for the period covered by this report may well wonder how any group of men could pronounce them "neatly kept and correct."

However, it appears that the voters are satisfied with the type of justice of the peace found in Hattiesburg. In the elections in 1931, two of those who were indicted in 1929, and who have been often reproached in grand jury reports, were re-elected. The one justice of the peace who had a "clean slate," so far as the grand jury reports and indictments and the bar association report were concerned, was defeated at the polls.

The lengthy consideration of the above-described episode seems justifiable for several reasons. First, it is the only outstanding attempt noted in the state to put a stop to certain apparent dishonest and illegal practices which seem to be common among the justices of the peace of the state; second, it brings out in glaring perspective some examples of these practices; and third, it very strikingly demonstrates one of the weakest points observed in connection with the justice of the peace court—the lack of adequate supervision.

By way of summarizing, the most obvious defects of the justice of the peace court, in addition to that one pointed out in the last sentence, may be stated. First, there are the various defects in connection with the fee system of compensating justices of the peace. There is little doubt but that a considerable number of the acts of malfeasance in office by the justices are traceable directly to the fee system. Secondly,

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dictments against others if we had had more testimony before us. We feel that with proper work and time between now and the meeting of the next grand jury that these additional cases against other justices of the peace and constables can be properly presented to the next grand jury, and we request that the matter be carried before that grand jury and the work that we have begun carried to a happy conclusion." *Minutes Circuit Court,* Forrest county (Miss.), Book 9, p. 592 (1929).

[30] *Ibid.,* Book 10, p. 30 (1930). In spite of the "efficient work" of the law enforcement officers, the grand jury said: ". . . . We are sorry to report that we find so much lawlessness in this county . . . we find that stealing, burglarizing, robbery and murder is rampant in this great country." From such a report as this grand jury made, one is constrained to believe that it was better qualified to "white wash" officers than to investigate crime conditions and official records.

there is an excessive number of justices of the peace in some counties, although the new law passed in 1932 promises to remedy this somewhat.[31] As it is now one notes a great deal of "competition" for business among the justices of the peace. The writer believes that the administration of justice should not be a competitive business. Closely related to this second defect is a third, that of overlapping jurisdiction among the justices of the peace and between them on the one hand and the other courts having jurisdiction over the same subject matter. In some towns and cities there may be as many as six different tribunals in which a prosecution for a single misdemeanor may be begun. Finally, there is the defect of popular election of justices of the peace. Well qualified men may not care to seek the office where it is steeped in the filthy lucre of petty politics, although such men might be induced to serve in the office if it were an appointive one and divorced from politics.

The defects of the justice of the peace court are not peculiar to Mississippi, but are found in the justice of the peace courts of other states. These defects have been often pointed out and commented on by publicists, officials, commissions of investigation, and others.[32] However, the students of the subject are not in agreement upon the question of how to remedy the defects in these courts. There are those who believe the justice of the peace courts should be abolished outright.[33] Others believe that there is still a place, especially in rural communities, for a minor judicial official of the general type of the justice of the peace, though indeed without many of the present defects.[34] We believe that reform of the justice of the peace court in Mississippi should be considered along with the reform, especially, of the other inferior courts. Therefore consideration of this subject will be deferred until the municipal courts are studied.

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[31] See *supra*, note 3.

[32] See especially, W. F. Dodd, *State Government*, 2nd. ed., 324 (1928); P. W. Wager, *County Government in North Carolina*, 237 (1928); W. F. Willoughby, *Principles of Judicial Administration*, 302-05 (1929); *Minutes of the Judicial Council of Virginia*, 31 (1931); Institute for Research in the Social Sciences, University of Virginia, *Criminal Justice in Virginia*, 157 (1931); New York Crime Commission, *Report*, 44 (1927); Committee to Suggest Remedies and to Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation (report submitted), *Reports of American Bar Association*, XXXIV, 578-609, at 591-92 (1909); Alfred Bettman (member of the Wickersham Commission), *Report on Prosecution*, 85-86 (1931); and *Judicial Council of Connecticut Report*, 22 (1930).

[33] See Willoughby, *op. cit.;* and Bettman, *op. cit.*, 120.

[34] This is the view of Herbert Harley as indicated in an article, "Efficient Minor Courts." *Journal of The American Judicature Society*, III, 13-16 (1917). Others who seem to share this view are W. F. Dodd, *op. cit.*, 324; J. A. Fairlie and C. M. Kneier, *County Government and Administration*, 271 (1930); and the "Committee to Report on the President's Plan for a Unified Court System" of the Mississippi State Bar Association as indicated in its report. See *Mississippi State Bar Association Reports*, XIII, 31-64 at 50 (1917).

The Municipal Courts. In every incorporated place in the state there is a municipal court, called either mayor's court or police justice court. The popularly elected mayor serves as judge of the mayor's court while the police justice court is presided over either by the mayor or a (salaried) police justice elected for a one year term by the city council. The municipal courts have jurisdiction over all cases in which the violation of a municipal ordinance is charged. In addition the judges of this court, as *ex officio* justices of the peace, have jurisdiction concurrent with the justice of the peace court within the boundaries of their respective municipalities.[35]

The police justice in any city with a population of 7,000 or above is required to be an attorney-at-law but in other places judges of the municipal courts are required to possess no higher qualifications than are required of justices of the peace. It has been observed that, on the whole, the municipal judges are better qualified than are justices of the peace. Even in many of the smaller towns and cities they are prominent attorneys. Unfortunately, the better qualified mayor-judges do not, as a rule, give much of their time to their judicial duties, especially in their capacity as *ex officio* justices of the peace.

The very fact that the justice of the peace and municipal courts are so very similar with respect to jurisdiction and function suggests the query as to whether the two courts should exist side by side in the same localities. With the exception of forty-five of the very small villages, there are from one to four justices of the peace in each incorporated place in the state.[36] The business coming into these courts does not seem to justify the number of petty judicial officers found manning them. Neither can the number be justified on grounds of convenience to the populace. On the other hand, there are reasons why the municipal and justice of the peace courts should not exist side by side.

As was suggested above in connection with the justice of the peace court, there is evidence of "competition" for the judicial business in places where several inferior court judges have concurrent jurisdiction. over the same territory. It may not be without significance that in certain cities where policemen are on regular salary bases, and in which no costs are assessed against defendants sentenced for violations of city ordinances, in many cases before certain justices of the peace the affiants are constables and the lists of state witnesses often contain the names of city policemen. In a case of this sort the policeman draws

[35] The statements here relative to the organization, jurisdiction, etc., of the municipal courts are based on provisions in the *Constitution of Mississippi,* 1890, sec. 172; and *Mississippi Code,* 1930, Ch. 50.

[36] *Biennial Report of Secretary of State* (Miss.) 1929-31, 89-134.

the regular fee allowed a state witness, whereas if the offender were taken into the city court there would be no fee for the police officer. This assumes, of course, that the city has an ordinance covering the act charged and that the city judge would act only in his capacity as a municipal judge. It is true that a person may be, and often is, tried in both the city and justice of the peace court for the same act.[37]

The practice alluded to in the last sentence above is another result of having state and municipal courts with overlapping powers. Where a person may be tried, on similar charges, twice for the same act, once for an offense against the state, and once for an offense against a municipality, it seems to be nothing more nor less than double jeopardy—a thing forbidden by the constitution.[38] However, such procedure has the approval of the Supreme Court of Mississippi, and of many other state supreme courts where circumstances are similar.[39] In Mississippi a mayor is not required to keep separate dockets in which to enter the "distinct" criminal proceedings against a person charged before him as a municipal judge and as an *ex officio* justice of the peace.[40]

A Summary of Conditions. In general, one notes four methods by which states attempt to improve the administration of justice in the minor courts, as follows: First, by abolishing the justice of the peace courts in certain parts of the respective states, for example in the larger cities or more populous counties or both, and creating more competent courts in their places;[41] second, by abolishing the justice of the peace courts on a state-wide scale and creating a more competent

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[37] See for example, the statement of the committee of the Forrest County Bar Association, quoted *supra,* pp 12-13.

[38] "No person's life or liberty shall be twice placed in jeopardy for the same offense." *Constitution of Mississippi,* 1890, sec. 22.

[39] *Johnson* v. *State,* 59 Miss. 543 (1882); *Ex parte Bourgeois,* 60 Miss. 663 (1883); and *Ocean Springs* v. *Green,* 77 Miss. 472 (1899). It should be stated that the present interpretation given to this clause cannot be called "judge-made" law. The constitution of the state ratified in 1869 had a provision relative to double jeopardy substantially the same as that contained in the present constitution. It will be observed that the first two cases given in this note were decided before the present constitution was adopted. Since the Convention in 1890 did not see fit to change the provision relative to double jeopardy, we may reasonably assume that it is the expressed public policy of the state to permit double prosecutions of the kind here under discussion. Any criticism of the practice must, therefore, be directed against the legal provisions themselves and not against the judicial interpretations placed upon the present constitutional provisions.

[40] *Murphy* v. *State,* 164 Miss. 296, 144 So. 699 (1932). For an excellent discussion of this subject see C. M. Kneier, "Prosecution Under State Law and Municipal Ordinance as Double Jeopardy", *Cornell Law Quarterly,* XVI, 201-11 (1931).

[41] Examples of such courts are the Chicago Municipal Court; the Recorders Court (for criminal cases) of Detroit; unified courts in certain cities and counties of California; and the municipal courts in Cincinnati, Cleveland, New York, Milwaukee, Buffalo and Atlanta. See Willoughby, *op. cit.,* 281-301.

minor court;[42] third, by creating a system of efficient minor courts to take over all or a large part of the functions of the justice of the peace courts but retaining the latter courts for certain purposes—or reasons;[43] and fourth, by creating a system of minor courts with jurisdiction concurrent with that of the justice of the peace, apparently with the purpose in view of eventually destroying the justice of the peace courts through a "survival of the fittest" struggle.[44] No attempt will be made here to evaluate these efforts. Suffice it to say that the administration of justice in many jurisdictions has been greatly improved as a result of changes made.

A statement by former Chief Justice John B. Winslow, of Wisconsin, that "there is no good reason why there should be so many courts of varying jurisdictions . . . all doing business in lofty disregard of each other"[45] was made with reference to the Wisconsin system of courts, yet it seems fairly to apply to the system in Mississippi, particularly to the inferior courts. The statement is rendered even more descriptive of the latter courts if for the phrase "of varying jurisdictions" is substituted "of varying and overlapping jurisdictions." It is clear from the above discussions of these inferior courts and their respective jurisdictional powers that they have been created with little thought of orderly arrangement, or little effort toward a systematic distribution of powers and functions.

All told, there are 1,055 inferior tribunals of the three kinds in the state at present.[46] In many places all three kinds of inferior courts exist side by side and with concurrent jurisdiction over many classes of cases. It may also be mentioned that the circuit court may exercise original jurisdiction in any state criminal case over which any of the inferior courts have jurisdiction. All of this means, of course, confusion and the lack of uniformity in the administration of justice even

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[42] The only state to make this method an accomplished fact is Massachusetts. See F. W. Grinnell, "Court Unification in the Bay State", *Journal of the American Judicature Society,* XV, 170-73 (1932).

[43] The trial justice system in certain counties of Virginia is illustrative of this method. A comment on this system will be found in a study made by the New York Bureau of Municipal Research, *County Government in Virginia,* 97 ff. (1928).

A bill providing for the establishment of a state-wide reform of the justice of the peace court in Kansas has been submitted to the legislature of that state by the state bar association. For details of the bill see *Journal of the American Judicature Society,* XIV, 173 (1931).

[44] The county court in Mississippi and the ordinary municipal courts in this and other states are examples of this latter method of reform.

[45] From an address delivered at a meeting of the Wisconsin State Bar Association in 1919. Quoted in *Journal of the American Judicature Society,* XVI, 59 (1932).

[46] Biennial Report of the Secretary of State (Miss.), 1929-31, opposite 56; 89-134, and 170-187.

in a single neighborhood. It has been shown that a petty criminal case originating in a city may be tried before either of as many as three justices of the peace, a municipal judge, the county court (in certain counties), or the circuit court. Also, if the case involves an act which is a violation of a city ordinance, an additional trial may be had in the municipal court.

A few statistics relative to the population, area, etc., of the state may well be given here. The 1930 census reports give the following facts:[47] The state had an area of 46,362 square miles and a population of 2,009,821 persons. The average number of persons per square mile was 43.4. The population was classed as 93.1 per cent rural and 67.7 as rural-farm. With respect to its percentage of urban inhabitants, the state ranked forty-eighth among the states of the Union. Forty-four of the eighty-two counties were classed as wholly rural and only five were listed as more than fifty per cent urban in population.

It is obvious from the above data that in formulating any plan for improving the administration of justice in Mississippi consideration should be given to the fact that one is dealing with a population which is largely rural and scattered over a rather large area. There are very few counties in the state where a continuous sitting of well paid judges seems justifiable. The judicial business in each of a large number of the counties of the state is insufficient to justify the establishment of a county court in each with a non-circuit riding county judge, even if all the judicial business of the county were brought into such a court. George county, for example, with an area of 475 square miles, a population of 7,523, and an assessed valuation of $3,005,608 would hardly be justified in maintaining a full time county court with a well paid judge. The judicial business of this county is now transacted by two justices of the peace (with very little work), the infrequent sessions of the mayor's court of Lucedale, the county seat, four days of chancery court annually, and seven days of circuit court each year (average). Other counties in which circumstances are very similar are Stone, Choctaw, Tunica, Webster, Itawamba, Tippah, Benton, Calhoun and Montgomery.[48]

On the other hand Hinds county might be justified in maintaining a county court with a general or limited jurisdiction. This county has a population of 85,118, an area of 858 square miles and an assessed valuation of $52,498,703. Counting only the inferior tribunals, there are twelve justice of the peace courts, seven municipal courts, and a county court in this county. Each of several of these

[47] *United States Census Reports*, 1930, I, 581; III, part 1, pp. 1265-1316.
[48] *Biennial Report of the Secretary of State*, 1929-31, 224.

transacts a considerable amount of judicial business each year. At the present rate of speed with which courts ordinarily transact their business there is no denying the fact that the judicial business in this county, even that over which the inferior courts have jurisdiction, is sufficient to justify a full time court in the county if a considerable portion of the work could be brought into this court. Several other counties offer somewhat similar situations.[49]

However, even in most counties where a county court would appear to be justifiable on the ground of volume of business, or on assessed valuation of the property in each county, there are certain other important factors to be borne in mind. As a rule such counties are large in area. Each has either a good size city within its boundaries or several smaller incorporated places, or both the former and the latter. Mere convenience to the people in the outlying rural areas or to those in the several villages, towns and cities away from the county seat, would no doubt require some sort of judicial tribunal or official at some place or places other than at the county seat. In other words, it will be difficult to supplant the local courts in the various counties in any satisfactory manner.

Reform in the Inferior Courts—A Suggestion. In view of the facts set forth in this study, the writer is inclined to agree with a committee of the Mississippi State Bar Association that "it is necessary to have some tribunal constantly in reach everywhere" in the state.[50] The conditions in Mississippi seem to warrant the retention of the justice of the peace court, though not in its present form.

Having arrived at this conclusion, two propositions present themselves for immediate consideration, namely, should the county court be continued in the counties where it exists and perhaps extended into other counties, and should separate municipal courts be maintained in the incorporated places? These will be considered in the order in which they were stated.

It is generally understood in Mississippi that the county court was created to relieve the congestion in the circuit court in certain counties. It is likewise understood that this congestion was generally most serious in the counties in which the larger cities are located, and that it was usually attributable to the unwarranted number of appeals from the municipal courts and urban justice of the peace courts.[51] It seems that there should be a better way of dealing with this situation. In

[49] *Ibid.*

[50] See *supra,* note 34, fourth citation.

[51] As was stated above, see note 1, the court was not mandatory in any county without a city of 5,000 people or more. Only five counties having such cities failed to qualify under the other provisions of the law; and only two counties have seen fit to establish a court under the permissive provisions of the law.

actual practice the county court in the counties where it is mandatory seems to be little more than an additional court with appellate powers. In every case but one (Harrison county) the county judge is elected from the members of the bar of the one city with a population in excess of 5,000 required to qualify the county under the law. The dockets of the court indicate that most of the business coming before the court arises in these principal cities, and is in large part cases appealed from other inferior courts. As has already been indicated, the real need was for a reorganization in the circuit court of the state.[52] The writer believes, therefore, that the county court should be abolished.[53] Its work would be automatically transferred back to the other trial courts through a repeal of the law creating it.

The existence of a municipal court alongside the justice of the peace court gives rise to some unsavory conditions. It would perhaps be better to have only one inferior court, or one judge of such court as a rule, with jurisdiction in any given territory. It has been suggested that the justice of the peace court should be retained in the state. In order to make our position clear it may now be stated that we believe the justice of the peace court should not only be retained, but should be the only inferior court in the state. In order that the administration of justice be improved under such a system, a thorough reorganization of the justice of the peace court should be made. It is the purpose next to show how this might be accomplished.

There should be, as a rule, not more than five justices of the peace in each county appointed by the circuit court judge of the district in which the county is located, from a list of eligibles submitted by the bar members of the respective counties.[54] Where it is conveniently possible, counties should be so districted that there will be not more than one village, town or city in each district. This village, town or city may be looked upon as the "seat of justice" for the district. Where it is not possible to so district a county that there will be not more than one incorporated place in each district provision should be made whereby districts, having more than one incorporated place, may

[52] See *supra*, note 1.

[53] The writer is not unmindful of the fact that the county court is accomplishing much good. In our study of the county court, before studying closely the other inferior courts, we were of the opinion that the county court should become the one inferior court, especially in rural areas; but with a more thorough study of the justice of the peace court with its magnitude of functions it seems that justice can be as efficiently and more conveniently, administered by a reformed justice of the peace court as by a county court. The suggestions here are made on the assumption that certain reforms be made in the circuit court also. These will be discussed in a later article.

[54] There would be no constitutional objection to this method of selection. They may be selected in a "manner provided by law." *Constitution of Mississippi*, 1890, sec. 171.

be subdivided and a justice allowed in each subdivision. This will insure each incorporated place convenient access to a court and at the same time avoid the overlapping of jurisdictions of inferior courts or judges now so much in evidence.

Exceptions to this general rule of complete segregation of jurisdictional areas may well be allowed in counties where the population of certain cities makes it necessary to place each of such cities in more than one district.[55] This could be conveniently done by giving all justices of the peace whose districts are wholly or partly made up of the territory within the city jurisdiction in all other such districts and then dividing the work among the justices on some logical basis such as civil and criminal, rural and urban, or the like. Even then it may be found necessary to appoint additional or deputy justices in certain cities or districts.

The justices of the peace should be paid regular salaries. The amount of salary for each justice, or for each justice in each of certain classes, could be determined by the amount of business which might reasonably be expected to come before the justice, or each justice in a given class, each year. In the larger cities the work would no doubt justify a reasonably high salary. Space does not permit a further discussion of this proposed inferior court in so far as its organization is concerned. Certain features relative to procedure will be briefly considered.

If juries are to be continued in the circuit court, and we believe they should be, there seems to be no good reason why their use cannot be entirely dispensed with in the justice of the peace courts.[56] When an appeal is taken in a case the appellant should be required to state whether he desires a jury trial in the circuit court, and to make a jury fee deposit if he does.[57] In a civil case if the appellant does not desire a jury trial on appeal but the appellee does the latter should be required to make the deposit. A bond might be used to cover the deposit.

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[55] The "district" from which justices of the peace are elected is the same as that from which a supervisor is elected. It would, therefore, be unfair to the larger cities to place each of such cities in a single district. This difficulty could also be circumvented by striking out the phrase "for each district" in section 171 of the state constitution through the amending process. If this were done each of the larger cities could be made a separate judicial district for this inferior court. However, in not more than eight counties does a city contain more than one-fifth of the county's population.

[56] There seems to be no constitutional objection to the abolition of the jury trial in the justice of the peace court (or any other inferior court of the state). It was so held in *Ex parte Wooten,* 62 Miss. 174 (1884); and *Telheard* v. *Bay St. Louis,* 87 Miss. 580 (1905).

[57] These provisions would not appear harsh in view of the present rules that a person cannot appeal at all in *forma pauperis* in civil cases, and, without a bond, an appeal does not prevent the immediate execution of a criminal judgment.

It is evident that many appeals from the judgments of the justice of the peace and municipal courts are now taken merely for delay. In many cases where appeals are taken it is found that the appellants enter pleas of guilty (in criminal cases) when the cases are called in the appellate court. In other cases the appellants do not "follow-up" the appeals and the cases are sent back on writs of procedendo, etc. As illustrative of the lack of sincerity apparent in appealing cases the docket of the city court of Hattiesburg for 1930 may be studied. There were 687 cases in which convictions were secured or pleas of guilty entered during the year.[58] Appeals were taken in 242 with the following results: In 108 *nolle prosequis,* dismissals, etc., were entered by the county judge, usually at the request of the city attorney; in 106 the appeals were not prosecuted; and in twenty-three trials were had (by 1932) in the county court.[59]

It is of interest in this connection to note that in the petty sessions court of England (corresponding somewhat to the justice of the peace and municipal courts in Mississippi) in 1927 there were 538,387 cases, including indictable and non-indictable offenses, in which penalties were imposed and in addition 85,116 criminal orders were issued. Out of the entire number of convictions and criminal orders appeals were taken in only 240 cases. This was two less than were appealed from the city court of Hattiesburg in the one year 1930.[60]

Evidently there are too many appeals being taken from the judgments of the inferior courts in Mississippi. The right of appeal should be restricted. Where there is a plea of guilty in a criminal case, or a confession of judgment or default in a civil case, no appeal should be allowed except by permission of the circuit judge. The appeal court should be authorized to impose a penalty where an appeal is taken and not "followed-up." In such a case the attorney for the appellant should be subject to a fine for contempt of court. Also, bondsmen should be made to "pay up" when a bond is defaulted. In other words, steps should be taken to make appellants and their henchmen realize that the courts are not to be toyed with.[61]

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[58] *City Court Docket,* Hattiesburg, Mississippi, 1930. Probably the statistics presented here afford an explanation of a remark by the chief of police in this city made to the writer in the summer of 1932. The officer somewhat pessimistically stated: "There is no use for my men to try to catch law violators in the city for if we catch the worst crooks and get them convicted in the city court, the cases will be 'thrown out' when they reach the county court." It may be that this attitude was the cause of the grand jury finding later that "the police department of the city [Hattiesburg] is not cooperating to preserve the peace of the city." *Jackson Daily News,* December 1, 1932.

[59] *City Appeal Docket,* County Court, Forrest county (Miss.), 1930-32.

[60] Pendleton Howard, *Criminal Justice in England,* 342-43 (1931).

[61] The writer has been informed that during the past year property has been sold in Forrest county to satisfy defaulted bail bonds—the first time in the his-

The work of the justice of the peace court should be more closely supervised by the circuit judges and the prosecuting attorneys. With the justices appointive better qualified justices may be confidently expected. A more summary method of removal may be needed, although the provision in the constitution whereby "by leave of court" a person can be proceeded against by information "for a misdemeanor in office" may be found sufficient.[62] Whether this power will be used by the circuit court for getting incompetent justices of the peace out of office is a matter of conjecture. Certain it is that the power is not used extensively under the present system. It is believed, however, that with a closer supervision of the work of justices of the peace to be presently outlined such a power will be more effectively exercised if need for its exercise still exists.

A report should be required of each justice of the peace each month showing all cases docketed, the disposition of, or progress made in each case, together with a statement of the fines, fees, etc., collected. This report should be made to the county auditor for the use of this officer and the judge and prosecutor. The money should be paid directly into the county treasury. From this report and from the county financial records the circuit judge should be able at all times to tell with reasonable accuracy how well each justice is performing his functions.

Periodic conferences of the circuit judge and the justices of the peace in each county should be arranged.[63] At these conferences the judge, perhaps assisted by the district attorney, could instruct the lay justices in their duties. As a result of such conferences justice should become more uniformly and efficiently administered in the county, or the circuit court district, if not the state. The conferences could serve as "schools of instruction" to the justices of the peace in such matters as making out warrants, affidavits, or other legal papers. It will be seen from studies of appealed cases that criminals often escape justice because of improperly drawn papers in the preliminary proceedings.

No doubt other reforms could be made in the inferior court procedure. It is believed, however, that these suggested will correct some of the most obvious defects. Likewise the suggestions with respect to the organization of a single court to supplant the three existing

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tory of the county that such a thing has been done. This is probably due largely to the "one man drive" to bring about better law enforcement being conducted by the capable young prosecuting attorney.

[62] *Constitution of Mississippi,* 1890, sec. 27.

[63] In discussing this proposition with a county prosecuting attorney in Mississippi recently, the writer was interested to learn that this prosecutor had attempted to arrange such meetings with the justices of the peace of his county. He was convinced from his experience that the plan has merit, although his own meetings proved disappointing because, attendance on the part of the justices being voluntary, many of them refused to take part in the meetings.

courts should, if adopted, go a long way toward correcting such evils as overlapping jurisdictions of courts and judges, competition among courts and judges, and inequalities and rank corruption in the administration of justice in minor cases. An advantage of the suggestions here is that they can be adopted without amending the constitution.

WRIT OF ERROR CORAM NOBIS

SIMON ROSENTHAL*

The writ of error *coram nobis* was a common law writ, the purpose of which was to correct a judgment in the same court in which it was rendered. The usual distinction between the ordinary writ of error and a writ of error *coram nobis* is that the former is brought for a supposed error in law apparent on the record and takes the case to a higher or appellant court; while the latter is brought for an alleged error in fact not appearing on the record and lies in the trial court itself, in order that it may correct the error which it is presumed would not have been committed had the fact in the first instance been brought to its attention.[1] There are two writs serving the above purpose depending upon the court from which the writ issues.

> "If a judgment in the Kings Bench be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the *same* court by a writ of error *coram nobis,* or *quae coram nobis resident;* so called, from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king; before the king himself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of the commencing of the suit, or died before the verdict, or interlocutory judgment; for error in fact is not the error of the judges and reversing it is not reversing their own judgment. So, upon a judgment in the Kings Bench, if there be error in the *process,* or through the default of the *clerks,* it may be reversed in the same court, by writ of error *coram nobis;* but if an erroneous judgment be given in the Kings Bench, and the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court upon such judgment. In the Common Pleas, the record and process being stated to remain before the King's justices, the writ is called a writ of error *coram vobis,* or *quae coram vobis resident.*"[2]
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> "From these statements it is seen that the writ of *coram nobis* is issued by the court in which the judgment assailed was rendered; while the writ of *coram vobis* is issued by a supervising court to a lower court in which the judgment was rendered."[3]

The function of the writ of error *coram nobis* is to bring to the at-

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*Member of the Bar of Jackson, Mississippi.

[1] 2 R. C. L. 305, 34 C. J. 393, 6 Am. & Eng. Enc. of Law, 810.

[2] Tidd on Practice, 1136.

[3] W. W. Thornton, "Coram Nobis et Coram Vobis," 5 *Indiana Law Journal,* 603.

tention of the court for correction, an error of fact—one not appearing on the face of the record, unknown to the court or party affected, and which, if known to the court at the time of the trial, would have prevented the judgment which is challenged. The writ lies only to correct the record of the trial itself, in matters of fact existing at the time of the pronouncement of the judgment, in respect of which the court was unadvised, but had it been advised, the judgment would not have been pronounced. The unvarying test of the writ of error *coram nobis* is a mistake or lack of knowledge of facts inhering in the judgment itself.[4]

The writ does not lie to correct any error in the judgment of the court nor to contradict or put in issue any fact already adjudicated. The writ does not lie to correct erroneous conclusions drawn by the jury or court from the facts proven or admitted on the trial; but to prevent the carrying into effect of a judgment rendered without considering, and in ignorance of, some fact which, if known by the court, would have prevented its rendition. Thus to proceed after the death of a party in ignorance of the death, or a judgment is rendered against an infant in ignorance of its infancy, or against a party without notice, or against a person when a valid defense existed in the facts of the case, but which, without negligence on the part of the defendant was not made either through duress, fraud or excusable mistake, and in cases of insanity where the issue of insanity is not involved at the time of the trial.[5]

The petition for the writ must be supported by proper affidavits and must satisfy the court that (1) the facts have been discovered since the trial, (2) the failure to discover the facts has not been due to lack of diligence on petitioner's part, (3) a different judgment would have been rendered on account of said facts.[6] Where there is a remedy by appeal, the writ of error *coram nobis* will not lie.[7] The petitioner must show that he has no other remedy.[8] The verdict of the jury is not that the former judgment be reviewed but that it be recalled and revoked.[9]

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[4] *Alexander* v. *State of Wyoming,* 20 Wyo. 241, 123 Pac. 68, Ann. Cas. 1915 A, 1282; *Collins* v. *State,* 66 Kan. 201, 71 Pac. 251, 60 L. R. A. 572, 97 Am. St. Rep. 361; *Holt* v. *State,* 78 Miss. 631, 29 So. 527; *Fellows* v. *Griffith,* 9 S. & M. (Miss.) 362.

[5] 5 Ency. of Pl. and Pr., 2; 23 Cyc. 885; 6 Am. & Eng. Enc. of Law, 816; *Fugate* v. *State,* 85 Miss. 94, 37 So. 554, 107 Am. St. Rep. 268; *Bennett* v. *State,* 106 Miss. 103, 63 So. 339; *Hawie* v. *State,* 121 Miss. 197, 85 So. 158, 10 A. L. R. 205; *Adler* v. *State,* 35 Ark. 517, 37 Am. Rep. 48; *Note,* 10 A. L. R. 214.

[6] Thornton, *op. cit.,* 5 *Indiana Law Journal,* 603; 9 *Texas Law Review,* 110; *Corby* v. *Buddendorff,* 98 Miss 98, 54 So. 84.

[7] *People* v. *Reed,* 195 Cal. 249, 232 Pac. 457, 36 A. L. R. 1435.

[8] *Dobbs* v. *State,* 63 Kan. 321, 65 Pac. 658; *Sanders* v. *State,* 85 Ind. 318, 44 Am. Rep. 29.

[9] 6 Am. & Eng. Enc. of Law, 811; *Fellows* v. *Griffith,* 9 S. & M. (Miss.) 362.

The writ of error *coram nobis* lies in the trial court. The petition should be directed to the court having control of the record. The question of the proper court to hear the petition is ably discussed in the case of *Ernest* v. *State of Wisconsin.*[10] The Wisconsin court held:

> "This court, under section 2408 of the Statutes, may in its discretion, whenever an issue of fact shall be joined or an assessment of damages by a jury be necessary in an action commenced in this court, order a jury trial or send the same to some circuit court to try the jury issue. This section apparently would preclude this court from trying the issue of fact raised by the writ of error *coram nobis* before a jury, because the cause of action is not one commenced in this court. With but few exceptions, the jurisdiction of this court is appellate, and, the principal aim of the writ of error *coram nobis* being to afford the court in which the action was tried an opportunity to correct its own record, the supreme court could not assume jurisdiction and try the issue without apparently usurping the functions for which it was created under the Constitution. It will therefore be seen that, while the functions of the writs have been enlarged in some instances, and while in others the proceedings in vogue at common law have been regulated, modified, and changed so as to meet with and conform to modern conditions and affairs, the protecting features involved in the original common law remedies are still intact, and the designed relief embraced in the original forms are still available under our modern practice, serving the purpose of protecting certain fundamental and inalienable rights with respect to life, liberty, and property, and affording, pursuant to the common law maxim, 'wherever there is a wrong, a remedy.'
>
> "We therefore hold that the remedy lies in the trial court, and that the petition to this court must be denied."

The statutes of Wisconsin appear to be similar to the statutes of Mississippi as to the jurisdiction of the appellate court. In *Brown* v. *Sutton,*[11] the Mississippi Court held that the record is always in the trial court:

> "Every court of record has general authority over its own records. The power of such a court to correct its records so as to make them speak the truth is inherent. The records of a court can be corrected or altered only by the court itself; and another court has no authority to make such corrections, even though it has appellate jurisdiction over the court whose records are sought to be corrected. 15 C. J. pp. 975, 196, and the cases there cited; 2 Encyc. Pl. & Pr. pp. 301, 302; 17 Encyc. Pl. & Pr. p. 907 *et seq.;* 22 Stand. Encyc. Proc. p. 491 *et seq.;* 7 R. C. L. pp. 1018-1020; 18 R. C. L. p. 166. See, also, *Wilson* v. *Town of Handsboro,* 99 Miss. 252, 54 So. 845, Ann. Cas. 1913 E, 345.

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[10] 179 Wis. 646, 192 N. W. 65, 30 A. L. R. 681.
[11] 158 Miss. 78, 121 So. 835.

"It follows that this court has no power to alter, amend or correct the records of trial courts in respect to the contents or recitals of those records. This is an original jurisdiction, not one that is appellate. It does not come within the principle that this court shall have such jurisdiction 'as is necessary to give full and complete operation to its appellate powers,' for the reason that the trial court may, and must, when the facts require, amend or correct a record even after the cause has been transferred to this court on appeal. 17 Encyc. Pl. and Pr. p. 922; 2 Encyc. Pl. and Pr. pp. 301, 302; 12 C. J. p. 971; 2 R. C. L. p. 155; 22 Stand. Encyc. Proc. p. 497. See, also, *Lupkin* v. *Russell,* 108 Miss. 742, 67 So. 185. Except as provided by Rule 28 of this court, the original records do not come to this court, but remain in the trial court, and, even as to those that are sent here under Rule 28, they remain, nevertheless, a part of the trial court records. 2 Encyc. Pl. and Pr. p. 301."

See also the case of *Robertson* v. *Southern Bitulithic Company.*[12] This procedure was followed in the case of *Hawie* v. *State,*[13] and *White* v. *State.*[14]

On the other hand, in two recent cases, one from Indiana and one from California, it has been held that after the affirmance of a case by a superior court, there was no case before the trial court in which application for the writ of *coram nobis* could be made and that any act which might have been done by the trial court in favor of the petitioner would have been *coram non judice.* In *Partlow* v. *State of Indiana,*[15] it is stated:

"Inasmuch as this writ, so far as we know, originated and was long recognized in the common law of England, the sole recognition given it in this state is by virtue of the adoption of the common law, where not in conflict with any organic or statute law. The courts of this state must be governed by the precedents established by the courts of England in relation to this writ, except where a change has been made by rulings of this court, or by organic or statute law. As long ago as 1781 it was decided by the courts of England that the writ of error *coram vobis* will not lie after affirmance by the exchequer chamber. *Burleigh v. Harris* (1734) 2 Strange, 975, 93 Eng. Reprint, 978; *Horne* v. *Bushell,* 2 Strange, 949, 93 Eng. Reprint, 961; *Lambell* v. *Pretty John* (1726) 2 Strange, 690, 93 Eng. Reprint, 786; 3 Bacon, Abr. (1860) p. 367; 1 Rolle, Abr. p. 755, pl. 16."

People v. Reed[16] follows the rule in the Partlow case. The last two cited cases, however, are based upon the theory that under the com-

[12] 129 Miss. 453, 92 So. 588.
[13] 121 Miss. 197, 83 So. 158.
[14] 159 Miss. 207, 131 So. 96.
[15] 194 Ind. 172, 141 N. E. 513, 30 A. L. R. 1414.
[16] 193 Cal. 491, 225 Pac. 859, 36 A. L. R. 1435.

mon law the office of the ordinary writ of error was to remove the record of the case from an inferior to a superior court for the purpose of enabling the latter to review claimed errors of law appearing upon the face of the record. In *Davis* v. *Packard*,[17] Chief Justice Marshall held that under peculiar circumstances, even after the affirmance of the judgment by a higher court, the right to a writ of error *coram nobis* existed. Under the modern jurisdiction of appellate courts, it is doubtful if said courts have the machinery to hear petitions for writs of error *coram nobis*. The original papers and records remain in the trial court, and the appellate court, in its decision, is confined solely and exclusively to matters on record. In Mississippi, it has been the custom to file the petition in the trial court and this custom has never been challenged.[18]

A discussion, in chronological order, of the Mississippi cases considering the writ follows. The Mississippi Courts, probably more than any other jurisdiction, have developed the law on this subject.

A case in Mississippi involving the writ of error *coram nobis* appears in 2 S & M, 81, decided in 1844.[19] In this case issue was joined upon the writ of error *coram nobis* and trial by a jury had upon said issue.

In *Fellows* v. *Griffin*,[20] Mr. Chief Justice Sharkey stated that "a writ of error *coram nobis* is intended to correct a mistake in fact, not error of law. Errors must be assigned on it, and, if the fact be disputed, an issue is made up to be tried by a jury. If it be found for the Plaintiff in error, the judgment is that the former judgment be recalled and revoked."

The petition must be addressed to the court in which the judgment was rendered, which alone had jurisdiction of it. In *Land* v. *Williams*,[21] the high court of errors and appeals, in affirming a judgment rendered by the Circuit Court of Yalobusha County, made an erroneous entry of judgment. The petition was addressed to the Circuit Court instead of to the high court of error and appeals. The high court held that the Circuit Court had no jurisdiction as the judgment was a judgment of the higher court. This case has been cited in many text books for authority to the effect that where an appeal is taken, the judgment becomes a judgment of the higher court and the petition for writ of error *coram nobis* should be addressed to said court. A study of the opinion, however, shows that this theory is not borne out

[17] 8 Pet. (U. S.) 312, 8 L. ed. 957.

[18] *Hawie* v. *State, supra; Carraway* v. *State,* 163 Miss. 639, 141 So. 342; *Cummins* v. *State,* 144 Miss. 634, 110 So. 206; *White* v. *State,* 159 Miss. 207, 131 So. 96, are late cases in which this procedure has been followed.

[19] *Keller* v. *Scott,* 2 S. & M. (Miss.) 81.

[20] 9 S. & M. (Miss.) 362.

[21] 12 S. & M. (Miss.) 362.

by the facts of the case. On the 20th day of November, 1846, both Thompson and Pitts were dead, and the high court rendered a judgment against Thompson as administrator of the estate of Pitts although Thompson, when alive, was in fact the executor and never the administrator. At the time of the rendition of the petition in the Circuit Court, Thompson was alive and the judgment was valid.

The petition for writ of error *coram nobis* must be definite and certain and must be supported by proper affidavits. The averments of the petition should not be in general terms, but must state specific facts. In *Holt* v. *State*,[22] the court refused to pass upon the question at that time as to whether or not the writ of error *coram nobis* may be invoked in criminal cases.

In the case of *Fugate* v. *State*,[23] the Mississippi court definitely committed itself to the proposition that the writ is available in criminal cases as well as in civil cases. This is one of the leading decisions dealing with the writ and has been quoted extensively by other courts. The court held,

> "It is perfectly clear, we think, on the authorities, that the writ is applicable to criminal as well as civil proceedings. Says Elliott, J., in *Sanders* v. *State,* 85 Ind., 324 (44 Am. St. Rep., 29): 'This was a very common remedy in civil actions, but was seldom resorted to in criminal cases. Although rarely used in criminal cases, we find it conceded by courts and writers to be an appropriate remedy in criminal prosecutions as well as in civil actions.' To the same effect, see *U. S.* v. *Plumer,* 3 Cliff., bottom of page 59 (Fed. Cas., No. 16,056); *State* v. *Calhoun,* 50 Kan., 523 (32 Pac., 38; 18 L. R. A., 838; 34 Am. St. Rep., 141); 5 Ency. Pl. & Pr., 32, par. 7. Indeed, it is obvious from the very nature and office of the writ that it applies as well to criminal as civil proceedings, in a proper case. For the 'office of the writ is to bring the attention of the court to, and obtain relief from, errors of fact, such as the death of either party pending the suit and before judgment therein; or infancy, where the party was not properly represented by guardian; or coverture, where the common-law disability still exists; or a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake.' Ency. Pl. & Pr., vol. 5, par. 2. It is true, doubtless, as said by Elliott, J., that the writ 'is seldom used in criminal proceedings;' but this results from the necessary differences between the steps usually taken and the mode of procedure in a civil and a criminal trial—in other words, from the inherent differences in the two modes of procedure. Wherever, in any procedure, civil or criminal, a proper case is made for the issuance of the writ, it still

[22] 78 Miss. 631, 29 So. 527.
[23] 85 Miss. 94, 37 So. 554, 107 Am. St. Rep. 268.

> exists as at common law, and may still, therefore, be used, unless a statute forbids. Ency. Pl. & Pr., vol. 5, p. 30. Our own court has so said in *James* v. *Williams,* 44 Miss., 47. As well said by Cowan, J., in *Smith* v. *Kingsley,* 19 Wend., 620: 'The power, therefore, remains as at common law, except as to the mere form, *coram nobis resident*' . . . . We, therefore, have lost the name of the writ, but nothing more."

In the case of *Corby* v. *Buddendorff,*[24] the rule is laid down that the petitioner must show that the failure to present the facts to the court was without any fault or negligence on his part. The fact to be presented to the court must be one affecting the validity and regularity of the proceeding, as, for example, where there is a vital jurisdictional defect not on the face of the record. The evidence can not be such as will be used affirmatively to disprove other facts presented at the original trial. A petition for a writ of error *coram nobis* should not be entertained where there are other remedies available or where other remedies, being available, have been waived.

In the case of *Bennett* v. *The State,*[25] the petitioner had been convicted of the crime of bigamy. The petition for writ of error *coram nobis* was based upon the fact that petitioner had been legally divorced from his first wife before his marriage to the second, and that his second marriage was void for the reason that it was contracted by him under duress. The court held that neither of these defenses could be made the basis of the writ of error *coram nobis,* for the reason that they existed at the time of the trial. The court refused to pass upon the question as to whether or not the writ could be available in cases where defendant failed to present certain facts at the trial on account of duress by fear of personal violence, there being no evidence to show such duress in the cited case. A petition for a writ of error *coram nobis* based upon the fact that the evidence had not been deduced because of duress and fear did not meet the prerequisites of the common law for certainly the evidence could not be classified as facts unknown to petitioner at the time of the trial. It would be a reflection upon the power of the court itself to protect its citizens and would open wide the doors for endless litigation.

In the case of *Hawie* v. *State,*[26] Hawie had been convicted of murder, and appealed to the Supreme Court. During the time the appeal was pending, petitioner, in vacation, filed an application with the trial judge for writ of error *coram nobis* to issue because of certain errors of fact, and alleged that petitioner, at the time of and during the trial,

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[24] 98 Miss. 98, 54 So. 84.
[25] 106 Miss. 103, 63 So. 339.
[26] 121 Miss. 197 (and 508), 83 So. 158 (and 675), 10 A. L. R. 205.

was an insane man, and that he was insane at the time of the commission of the crime, and is still insane. The State demurred to the petition and from an order sustaining the demurrer, an appeal was taken. After a full discussion of the many authorities and decisions, the court laid down the following rule, which clearly holds that insanity, as set forth in said petition, is a ground for the writ.

> "From these authorities it unquestionably follows that if the defendant in this case was insane, the court was in error in placing him upon trial and in pronouncing the judgment of conviction. The fact of the prisoner's insanity was not known either by court or counsel. There was an error of fact which led to an unlawful trial. It must be remembered that we are not here dealing with any alleged errors in reference to the indictment, arraignment, or the actual conduct of the trial itself. The rulings of the trial court on the merits of the case are not presented. We are confronted with an error of fact which was unknown to the court and one which, if the court had known, would have prevented any trial whatever. What then is the prisoner's remedy? The error is one that could not have been availed of during the term of court at which the defendant was convicted. There is, therefore, no remedy by appeal. Does the fact that the term of court has elapsed or adjourned preclude any further inquiry or deny any relief? No statute of our state affords relief in the case made by the petitioner. The remedy, if there be one, must be found in the common law. The petition prays for a writ *coram nobis*. The office and functions of a writ in the nature of the writ *coram nobis* have been clearly and well stated in previous decisions of our court. It is not, therefore, the purpose of this opinion to trace the history or justify the use of such writ in our commonwealth. It is sufficient to say that a writ in the nature of the writ *coram nobis* has always been recognized in our state as a common-law remedy in appropriate cases. . . Under these authorities it is clear that the writ is an available common-law remedy in both civil and criminal cases. It only remains to inquire whether the remedy is available to appellant in the case at bar. On the admitted facts, there can be no doubt on this point. Indeed insanity at the time of trial or judgment presents a case which the writers have used as illustrating a proper case for the writ *coram nobis*."

In the case of *Cummings* v. *State*,[27] subsequent to the trial and after the adjournment of court, and while the case was on appeal to the Supreme Court, the appellant filed a petition for a writ of error *coram nobis*, alleging that he had received a letter from one of the witnesses in which she stated that her testimony was false, and that she had been compelled to testify against the appellant. A demurrer to the application was sustained. "There is no merit in this appeal, as the applica-

[27] 144 Miss. 634, 110 So. 206.

tion to writ of error *coram nobis* will not allow any such case. . . . The credibility of the witnesses and the truthfulness of her testimony was an issue in the main trial, and the Defendant was perfectly competent to understand the issue and conduct his defense." This case illustrates the rule that the new facts set forth in the petition must not be such facts as tend to controvert the issue or bear upon any issue presented to the court and jury at the trial.

In the case of *White* v. *State*,[28] the defendant was convicted of larceny and from said conviction an appeal was taken to the Supreme Court. After the adjournment of the Supreme Court, a petition for writ of error *coram nobis* was presented to the Circuit Judge in vacation. The petition was based upon the ground of newly discovered evidence. The Circuit Judge instructed the court reporter to make up the record of the hearing on the petition for writ of error *coram nobis,* and forward it to the Supreme Court for consideration along with the appeal in the main case. The Supreme Court held that the Circuit Court was the court of original jurisdiction and that it was its duty to pass upon the question involved. It follows, therefore, that the Mississippi court is committed to the rule that the record remains in the Circuit Court and that the petition should be addressed to said court, unless, of course, the error is made in the entry of the judgment on the minutes of the Supreme Court. "Under Section 146 of the Constitution, the Supreme Court is an appellate court, and not a court of original jurisdiction. The Circuit Court cannot abdicate any part of its judicial functions or duties in favor of the Supreme Court or any other court, *St. Louis & R. Co.* v. *Bridges,* 156 Miss. 206, 125 So. 423, 426."

In the recent case of *Carraway* v. *State*,[29] it is held that the issuance of the writ does not operate as a supersedeas but may be permitted to do so in proper cases upon giving security therefor. In dealing with the manner and form of issuing the writ, the court stated,

> "At common law the writ was issued by the cursitor, a junior clerk in the court of chancery, in the name of the king, addressed to the judges of the court in which the judgment sought to be revised was rendered, directing them to examine the record and proceedings on which the judgment was based, and 'cause to be done thereon what of right and according to the law and custom of England ought to be done.' Archibald's Practice, 275; Archibald's Forms, 236; 2 Tidd's Practice, 1141; *Teller* v. *Wetherell,* 6 Mich. 46. The writ was then presented to and allowed by the master in open court; a copy of the order allowing it was then served upon the opposite party. . . .

[28] 159 Miss. 207, 131 So. 96.
[29] 163 Miss. 639, 141 So. 342.

"With us the actual issuance of the writ is unnecessary, for this court has more than once said that the relief, for the granting of which the writ of error *coram nobis* lies, can be granted on a motion or petition, without the issuance of the writ. . . .

"This seems to be in accord with the rule in other jurisdictions, and with the statement in *Elliott* v. *McNairy,* 1 Baxt. (Tenn.) 342, that the issuance of the writ is a mere fiction. The writ is now, and for a long time has been, practically obsolete in England, so much so that, as pointed out by the Supreme Court of the United States in *Martin Pickett's Heirs* v. *Legerwood,* 7 Pet. 144, 8 L. Ed. 639, cited in *Fugate* v. *State,* 85 Miss. at page 101, 37 So. 554, 107 Am. St. Rep. 268, 3 Ann. Cas. 326, Blackstone did not even refer thereto. That statement is equally applicable to Halsbury's Laws of England."

The writ of error *coram nobis* is certainly not obsolete in the State of Mississippi nor in any other common law state, unless made so by statute. It forms a necessary part of the practice and procedure in the Circuit Court; it forms no part of the practice in the Chancery Court for the Chancery Court is vested with its own machinery in matters of this kind, and the writ is exclusively a common law writ.[30] It is true that there must be an end to litigation. For this reason, the granting of the writ should be exercised with the utmost caution and the grounds for granting the writ must be certain and definite, and restricted to such cases as where the facts to be presented are such that if said facts had been presented to the court at the original trial, the judgment rendered would not have been rendered; or, if said facts had been presented and appeared on the record, the judgment would be refused on appeal.

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[30] *Reid* v. *Strider,* 7 Gratt. (Va.) 82.

NECESSITY FOR RIGHT OF APPEAL FROM DENIAL OF WRIT OF ERROR CORAM NOBIS

Wm. I. McKay*

Under supposed and so-called statutory substitutes therefor, our bench and bar are inclined to relegate the quaint and curious common law writs of error *coram nobis* and *coram vobis* to the limbo of innocuous desuetude. The very nature and office of the writ limit the need therefore and restrict its application to comparatively rare occasions. However, when the need for it arises, its great importance appears. During the early period of our jurisprudence, it was not of infrequent occurrence in our civil cases; but it appeared, for the first time in a criminal case, and all but without recognition, in our case of *Hart* v. *State,* 78 Miss. 631 (1900). The petition for the writ was presented to the trial judge, after verdict, judgment and adjournment, but before appeal, and it was denied. The supreme court affirmed the denial of the writ; but declined to decide whether such a writ, if allowable at all, may be reviewed by appeal from the action of the lower court in vacation refusing it. Neither would the supreme court decide whether the writ could be invoked in a criminal case. It disposed of the petition for the writ as too vague. However, the court reversed the conviction of murder on the merits. It is singular that the suggestion should have been thrown out that the writ was not applicable to a criminal case.

The writ next appeared in our case of *Fugate* v. *State,* 85 Miss. 94, wherein it received an illuminating discussion. It was very properly held applicable to criminal as well as civil proceedings; but the Supreme court again declined to decide whether an appeal would lie from its denial. It received consideration in the case of *Bennett* v. *State,* 106 Miss. 103, but without interest or instruction.

Then it came before the supreme court in the case of *Hawie* v. *State,* 121 Miss. 197. After sentence to death and the adjournment of the trial court, the convict filed his petition for the writ on the ground of insanity at the time of the trial and since. The state demurred to the petition, the demurrer was sustained, and the convict appealed to the supreme court, which reversed the lower court and remanded the case for a trial on the merits of the petition. May that action on

* Member of the Vicksburg, Mississippi, Bar.

the part of the appellate court be considered as in the nature of a writ of error *coram vobis*? The right to appeal was not questioned.

The writ was considered in *White* v. *State,* 159 Miss. 207. Curiously enough, the lower court failed either to grant or to refuse the fiat for the writ, and sent the original question to the supreme court for decision, which, as an appellate court, it declined to determine.

And the latest appearance of the writ was in the case of *Carraway* v. *State,* 163 Miss. 639. In this case our supreme court for the first time squarely decided and held that no appeal lies from a denial of the fiat for the writ by the trial judge. This absence of the right of appeal is the subject of this discussion.

To this conclusion the supreme court reasoned in these words:

> "Appeals from the circuit court to the supreme court lie under section 13, Code 1930, from final judgments only; consequently, the appeal here will not lie unless the order appealed from is a final judgment within the meaning of that statute."
>
> Section 13, Code 1930, in material part is as follows: "Appeal from final judgment or decree.—An appeal may be taken to the Supreme Court from the final judgment of a circuit court in a civil case . . . "
>
> The above statute does not apply to appeals in criminal cases.
>
> Section 16, Code 1930, in material part is as follows: "Appeal in criminal cases.—Any person convicted of an offense in a circuit may appeal to the supreme court," . . .

It is clear that this last statute exclusively controls appeals in criminal cases.

It may be that "convicted" in section 16 would be held equivalent to "final judgment" in section 13.

However, basing its decision on section 13, the court proceeds to inquire into the nature of, and the method of obtaining, the writ; and arrives at the conclusion that the granting or refusal of a fiat for the writ is not a judgment, but is like granting or refusing a "remedial" writ under section 742, Code 1930, from which it is said no appeal lies.

This is nothing in the nature of a suggestion of error, being out of time and *coram non judice.* The writer has had no luck with such suggestions when in time and *coram judice.*

No research will be conducted into the interesting history and office of the writ. The inquiring mind will prefer to make an independent investigation. Suffice it to say that when the need for the writ arises its importance looms large, for as a rule it involves matter that goes to the very foundation of the judgment or the fairness of the trial. If the relief is denied, the judgment thereon is that the judgment assailed be affirmed; if the relief is granted, the judgment thereon is

that the judgment assailed be recalled and the *status quo ante* restored.

Should the right to appeal be determined by a technical consideration of the rare application or limited office of the writ; or should the judicial power be diligent to find the remedy of appeal in regard and proportion to the right and consequences involved? While the constitution does not in words guarantee a fair trial, yet everybody believes it does, and no one could be convinced to the contrary. That a fair trial must be had is a mandate of justice that is higher than any constitution and scorns mere forms and procedure. Suppose that an insane person is unwittingly tried, convicted and condemned to death; suppose a person is tried, convicted and condemned to death under the irresistible force of impending mob violence; or suppose that the State, in the zeal and fervor of its prosecution, introduces controlling testimony, known to it to be false, and thereby procures the condemnation of a person to death; is the writ of error *coram nobis* to correct such injustices to be lightly regarded as an obsolete technicality, denied by the trial court, and from which denial there can be no appeal?

The dissenting opinion in the Carraway case, 148 So. 345, brings out into bold relief the point of this discussion, that is, the importance of the writ and the need for an appeal from its denial, especially in the case of an unfair trial. If such right of appeal does not now exist, in the absence of statute, such right should be provided by the legislature.

Carraway was convicted of a capital offense and sentenced to death, and the judgment of conviction was affirmed. After the affirmance of the case, a petition for a writ of *coram nobis* was sued out before the judge in vacation, and the judge declined to grant it. He appealed to the supreme court and the appeal was dismissed on the ground that the right to appeal did not exist. Thereafter, he filed a motion for a new trial in the trial court, which motion was heard in term time and denied, and an appeal was taken to the supreme court, resulting in an affirmance. Sufficient of the dissent is quoted to indicate the situation:

> "But as corroborative of the issue in chief, there is the testimony of a deputy sheriff . . . , and this witness testified in positive terms that in company with the district attorney he had visited the appellant in jail in an adjoining county the next day after the commission of the alleged crime and that the appellant made an unqualified confession of his guilt. This witness having been introduced by the district attorney who was present at the time of the alleged confession, it impressed me, as of necessity it must have impressed every juror, that this confession so testified to was vouched for by the district attorney as being a correct representation to the jury by the said witness, else the district attorney knowing the testimony not to be accurate and true, would not have put

this witness on the stand thus to testify, and hence the case was affirmed.

"But now, remarkable to say, the said witness who then so positively testified, has retracted his testimony, which of all was the most damaging to appellant, and admits that appellant made no such confession, and the district attorney now introduced as a witness admits that no such confession was made and that he knew it at the time of the original trial. So it is then that the facts stand out undisputed, that . . . the natural tendency towards a conviction was furthered and enforced beyond hope of defense by the use of the district attorney of an alleged confession which he knew from his own absolute personal knowledge was never made, and which he admits he then knew was not made. . . .

"The district attorney . . . was then in the embarrassing position of having either to take the stand and dispute the said testimony and make the court and jury to know that an incorrect version had been given by the witness or else ask that the jury be discharged and the case continued to another day to be heard by another jury. Now, why was not one or the other of these two courses taken, or some course which would have relieved the appellant of the wrong done him by this incorrect testimony on the part of the state—testimony known by the district attorney then and there to be incorrect and grossly prejudicial to the person on trial for his life? . . . Could anybody be actually deceived that there was a fear of mob violence"? . . . It seems to me that it must require a considerable effort and only after passing almost insurmountable difficulties that an impartial mind can rest upon any other conviction than that this unfortunate defendant has not had a fair trial, or to use a term of common parlance, has not had a fair deal; and it is my conception of the judicial duty, . . . that in such a case the court of last resort, . . . should apply a corrective and grant a new trial in which a fair deal may be had. Technical rules of procedure are, of course, necessary and an observance of them is essential; but the requirements of common and honest justice on the merits in an issue of life and death rise far above mere rules of procedure. It seems to me in the light of what has now been developed, that this appellant is being ordered to the gallows out of respect to technical rules and that the merits have been subverted instead of being held aloft, and that such a result is not only an injustice, but is hurtful to the law and detrimental to that high regard in which it should be held."

The Carraway case reminds the writer of another recent case, in broad outline as follows. John Doe was suspected, arrested, jailed, indicted, tried, convicted, and sentenced to be hanged for a most heinous and revolting murder, if in fact a crime was committed at all. The evidence against him was entirely circumstantial, consisting for the most and controlling part of supposed blood stains on his wearing apparel and a knife found near the scene of death. When Doe was

placed in jail, the knife and his wearing apparel, without his knowledge, were by the sheriff sent to a competent chemist for tests as to the nature of the stains. The chemist made written reports of his tests and sent one to the sheriff and one to the district attorney several months prior to the trial, showing by exact science that there were no human blood stains on any of the many articles, but that there was the stain of beast blood on the cuff of his undershirt sleeve. At the trial neither Doe nor his attorney knew anything whatever of the chemist's tests or reports. On the trial the state introduced witnesses who testified that there was fresh blood on the knife when found, with no evidence whatever that the knife, or any knife had been used to accomplish the death of the deceased; that, five or six hours after the death and after having been washed by Doe, "pure blood was running out of the front and sleeve of" Doe's coat; and, when Doe testified that the stain on the cuff of his undershirt sleeve was that of the blood of a cow that he had a few days before helped to slaughter, the state in rebuttal took great pains to contradict Doe's corroboration of the tests and reports of the chemist, which were never introduced in evidence, by the testimony of the two men that Doe had assisted in the slaughter of the cow that he never got any cow blood on his sleeve cuff. Aside from some prior threats, the other circumstances rather strongly pointed to Doe's innocence, such, for an instance, that he, a sick man, had to walk or run four and one half miles, fight two able bodied persons to their death, drag their bodies into the house, set fire to the house, and walk or run back four and one half miles, all in one and three quarters of an hour. In other words, on the testimony and argument of the state, the jury convicted Doe almost entirely on the mistaken belief that the stains on the knife and his wearing apparel were made by the blood of the deceased, when the state knew from scientific demonstrations that the stains were not from human blood at all. Doe may have been guilty, but he did not get a fair trial.

The chemist's report, without fault of Doe, was not proved on the motion for a new trial, which was overruled. An appeal was taken to the supreme court, strangely without the chemist's report being made a part of the record, the conviction was affirmed, and Doe was sentenced to be hanged.

Shortly before the day of execution, the writer was requested by a stranger to Doe, without compensation or hope thereof, to look into the matter to see whether everything was regular. The record was examined, and the chemist's report was found and examined. A petition for a writ of error *coram nobis* was presented to the trial judge, with the report of the chemist, and the petition was denied. Of course,

the ground for the writ was that Doe had not had a fair trial, on account of all the false, fatal blood testimony against him. The Carraway decision prevented an appeal.

The pardoning power was all but vainly appealed to, the executive taking the strong position that it was not within his province to pass on the question of a fair trial, after the verdict of the jury, the judgment of the trial judge, the denial for the motion for a new trial, and the affirmance by the supreme court. But finally, after much importunity and the most painstaking consideration, the pardoning power was persuaded to commute the death sentence to life imprisonment, the executive, for fear of the possibility of Doe's guilt, refusing to go further, and being, of course, without power to grant a new trial. The executive so acted on the conviction that Doe had not had a fair trial, a question that should have been passed on and settled by the courts. When the judgment of our courts takes one's life, liberty or property and that judgment is vitiated by force, fraud, unfairness, or invalidity, it should be blotted out forever, and the courts should find the remedy, even to the extremity of impinging on judicial convenience and procedure. And if the courts cannot find a remedy, the legislature ought to provide one. We must not have our faith in our courts shaken. They are our last resort.

MISSISSIPPI—STORM CENTER OF SECESSION

PERCY LEE RAINWATER†

II

LINCOLN ELECTED—THE PROPOSED REMEDIES*

The success of the free States in electing Lincoln President was the signal in Mississippi, as in other Southern States, for beginning a new phase of the secession controversy. No political leader of "note or influence" in Mississippi dissented from the view that the triumph of Lincoln, author of the saying that the nation must be "all slave or all free" and the leader of a sectional party organized separately for the purpose of getting control of the government in order to wield its power against the social and economic system of the South, made it imperative that "the slave States should take measures for their safety."[1] But it soon became apparent that there was a sharp diversity of opinion about the proper remedy for safeguarding the State's "peculiar institution" against the onset of the new forces soon to have control of the government. When the election of Lincoln was known for a certainty, great confusion and uncertainty prevailed among the people. Neighbor talked with neighbor and the question on every tongue was: What will be Mississippi's answer to the election of a Black Republican to the presidency?[2] Having been thoroughly aroused through the press and from the stump as to the dangers which now

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† Associate Professor of History, University of Mississippi.

[1] MS. Wiley P. Harris, Autobiography.

How general the idea of resistance was immediately after the election of Lincoln may be judged from the facts that community meetings sprang up spontaneously in many of the counties of the State. All such meetings adopted resolutions advocating some form of resistance. The *Mississippian* for Nov. 21 to Dec. 19, 1860, gives an account and date of such meetings in twenty-five out of the sixty counties, as follows: Bolivar, Nov. 17; Carroll, Nov. 24; Choctaw, Nov. 19; Clarke, Nov. 22; Copiah, Nov. 16; DeSoto, Nov. 24; Harrison, Nov. 8; Hinds, Nov. 14; Holmes, Nov. 12; Jasper, Nov. 22 (*Eastern Clarion,* Nov. 28); Kemper, Nov. 19; Lauderdale, Nov. 12 (*Eastern Clarion,* Nov. 21); Lawrence, Nov. 19; Lowndes, Nov. 19; Madison, Nov. 19; Newton, Nov. 17 and 24 (*Eastern Clarion* Dec. 5); Panola, Nov. 20; Pike, Nov. 15; Rankin, Nov. 24; Tallahatchie, Nov. 19; Tippah, Nov. 13; Warren, Nov. 15; Wayne, Nov. 22 (*Eastern Clarion,* Nov. 28); Winston, Nov. 24; and Yazoo, Nov. 18.

[2] MS. W. T. Ratliff to Mary Ratliff, Raymond, Hinds County, Mississippi, no date.

hung over them, the people awaited leaders to direct them in the way they should go. "I sincerely believe," wrote Charles D. Fontaine of Pontotoc to Governor John J. Pettus,

> That 9 out of every 10 who voted for Breckinridge will vote for direct secession. And I know that most of the Douglas men, to repel the free Soil suspicion, their late conduct has duly elected them to, are already earnest advocates of Secession. Many good men besides who voted for Bell did so in an honest effort to defeat Lincoln, and thus avoid a cause which they think sufficient to avoid secession; so that I am satisfied that for every timid Breckinridge man who will vote for acquiescence we will gain two from the ranks of Bell and Douglas, who will vote for secession. Every man of every party is in favor of Mississippi's sustaining any other Southern State who may secede against any act of coercion.
>
> Governor—sure as you live the people are a long way in advance of those they have honored with posts of leadership. All they want is some Known Leader who will throw himself into the breach. Who will show them the way? Where is Jeff Davis? Will he let this auspicious moment pass by ? If it does so pass, I greatly fear that the spirit of resistance will be forever quenched, and the flame of Liberty smoulder out in the ashes of base submission.[3]

Fontaine urged the Governor to convene the Legislature at once and to make his message as "explicit" as that of the "Governor of South Carolina."

The views of Fontaine with reference to secession as a remedy were typical of those of the great majority of political leaders and newspaper editors who had supported Breckinridge in the presidential canvass. The *Mississippian,* which struck the keynote for the lesser organs of the State, openly avowed itself for disunion as the remedy.[4] "In view of the formal declaration, through the ballot-box," said the editor of the *Mississippian,* "of a purpose by the Northern States to wield the vast machinery of the Federal government as now constituted, for

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[3] MS. Pontotoc, Mississippi, November 12, 1860. Governor's correspondence, Series E, Department of Archives and History, Jackson, Mississippi. Fontaine was the Know-Nothing candidate for Governor in 1855. He was a member of the Convention of 1861 from Pontotoc county.

Jefferson Davis, far from placing himself at the head of those who wished to precipitate the State into secession by separate State action, was opposed to such a program and was counselling delay and co-operation with at least the Gulf States. See letter of Jefferson Davis to B. R. Rhett, Jr., Warren County, Mississippi, November 10, 1860; Rowland, *Jefferson Davis,* Vol. IV, pp. 541-542.

The *Natchez Free Trader,* Dec. 1, 1860, declared that two-thirds of the people of the State were for "immediate secession and no compromise." The *Columbus Democrat,* as quoted by the *Natchez Free Trader* of Nov. 21, 1860, estimated that "two-thirds of our people are now for immediate secession." The *Vicksburg Whig,* Nov. 13, 1860, welcomed the issue of disunion, confident that the people would place the "seal of condemnation" upon it by "at least 25,000 majority."

[4] *Natchez Courier,* Nov. 15, 1860. The editor in this issue says that the newspapers which supported Breckinridge "are generally in favor of disunion."

destroying the liberties of the slaveholding States, it becomes their duty to dissolve their connection with it, and to establish a separate and independent government of their own." Declaring that there was "danger in delay" and that there was "no probability of an appeal to arms," the *Mississippian* proclaimed, as a remedy, the immediate secession of the State, acting in a spirit of conciliation but independent of the acts of all other slaveholding States, as the only "path of honor and of safety." "Now is the time to act," said the editor;

> Let the final act of secession be taken and fully consummated while the Federal Government is in friendly hands. Much may be accomplished before the 4th of March next. But then we are told that it will be several years before Lincoln will have control of the sword and the purse through the instrumentality of Congress. This furnishes additional argument for action Now. Let us rally to the protection of our sovereignty, before the enemy can make good his promise to overwhelm us. The issue is upon us. Delay is dangerous. Now is the time to strike. Let not a moment be lost.[5]

The *Natchez Free Trader* wanted the issue in the State to be made direct, "immediate secession or submission."[6] The editor was confident that all parties would unite for immediate secession and he was sure that the feeling in the State was "that ABRAHAM will hardly get his ugly mug into the White House."[7] The *Vicksburg Sun* declared that Mississippi could not submit to Lincoln's election without "dishonor" and "degradation." "Aaron's rod," said the editor, "has swallowed up all the rest. Fanaticism and hostility to the social conditions of the South have received a national sanction. . . Arise men of the South, and strike a blow for your homes and firesides, your altars and your sacred places. Arise!"[8] "Now is the day and the hour to act," said the editor.

> It is no time to be timid and over-cautious from a dread of danger. When the enemy is thundering at our gates, it is no time to be taking council of our fears—a blow struck at the right time may turn the whole current in our favor, and place us beyond the reach of storms of disaster and ruin. The South has now the power. Cotton is king—it has always been a great peace-maker, and it is all-powerful to save. The gold and the silver of Europe will come to buy the mimic snow of the South—cotton; and the ships of Europe will come to carry it away, even though Lincoln be President and the South a separate nationality. Safely entrenched behind her cotton bags, she can defy the world—with such a breast-

[5] November 14, 1860. Similar views in the issue of November 21, 1860.
[6] December 1, 1860.
[7] December 8, 1860. Similar views in the issue of November 21, 1860.
[8] November 12 and 19, 1860.

> work she can laugh a siege to scorn. Keep out abolition emissaries and we are a match for all the civilized world—for the civilized world depends on the cotton of the South. In case of secession, we shall have more than half the crop on hand, and all the world clamoring for it. Again we say we are independent of the world and can take care of ourselves.[9]

The *Vicksburg Whig* announced its attitude towards the "resistance" program proposed as a result of the election of Lincoln, when on Nov. 8, 1860, the editor said, "resistance is rebellion and it is treason to secede." The policy of the *Whig,* said its editor, was to impress upon the people that secession was revolution and an abandonment of the rights of the South under the Union and the Constitution; that the "bitter fruits of secession or revolution would be strife, discord, bloodshed, war, if not anarchy"; and that, in short, secession would be a "blind and suicidal course." "Let others do what they will," the editor affirmed, "but as for us, we will still stand by the *Union,* the *Constitution,* and the *Laws!*"[10] The *Whig's* attitude towards the crisis resulting from Lincoln's election reflected the views of conservative men of property generally.[11] How an Ole Line Whig, the owner of a hundred slaves, was haunted by anxiety and fear of impending revolution is typically illustrated by certain entries for November and December 1860 in the Diary of B. L. C. Wailes of Adams County, appearing, in part as follows:

> November 6—Voted today for Bell and Everett or Union ticket for Electors for President and Vice-President of the U. S. . . . The latter [Breckinridge and Lane] being the secession or disunion ticket and its partisans very violent and intemperate—and *insane.*
>
> November 7— . . . no doubt of the election of Lincoln. The people here are much exasperated and it is feared that Gov. Pettus will by some hasty and intemperate action seek to precipitate the State into secession.
>
> November 12—Our country is in a critical condition. Secession seems to be wished or determined upon by the party leaders and it seems that the election of Breckinridge would not satisfy them and would be regarded as taking away all pretense for breaking up the Union.
>
> November 15—We are still in suspense as to the absolute result of the Presidential election. It is admitted however, that Lincoln is elected. The Governor of South Carolina has convened the Legislature of that State and advises immediate secession.
>
> November 21—At home reading miscellaneous trash. Anything to shut out a moody disposition excited by the prospects of

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[9] *Vicksburg Sun,* November 12, 1860.
[10] See also the *Vicksburg Whig* for November 9 and 13 and 14, 1860.
[11] *Natchez Courier,* Nov. 29, 1860 (Quoting from the *Vicksburg Whig*).

anarchy, riot, and revolution impending. The papers are filled with torrents of violence; and bloodshed seems to be inevitable. Federal officers in South Carolina and Georgia (Judges, Marshalls, Collectors of the Ports or Customs and Senators) are resigning. Threats of confiscation and banishment are held out to any who dare accept office and the desperate demagogues are inflaming and exciting the populace to precipitate our country into a state of lawless violence and terror.

December 6—A visit from Lieut. Carter (U. S. N.) and Mr. Sprague of N. O. At home reading, etc. Mr. Sprague reports a number of failures among the merchantile houses of N. O. and great moneyed embarrassment—the effect of the political panic gotten up by our demagogues.

December 8—Mr. Alex Stephens has made a very able, temporate and conciliatory speech in answer to one of the most violent, inflammatory and disunion ones from Toombs. The latter is for precipitating the Southern States into Secession or revolution without thought or reflection and unwilling to trust the people to think or act in the matter.

December 12—Received letters from overseers. Owens, the overseer of Miss Covington [Wailes' niece], declines buying her land and wishes to continue to oversee for her. This is the effect of the financial panic which has been brought about by our *reckless* and unprincipled politicians with their secession agitation. A number of the commission house in N. Orleans have failed as a consequence of these agitations some for very large amounts.[12]

Realizing the impossibility, in Mississippi, of turning back the rising tide of "stern resistance," the conservative, "Union-loving" men of the State adopted the strategy of throwing themselves into the current and endeavoring "by calm and conservative action so to direct and steer it as to uphold the Union and at the same time to secure all the rights of our section under the Constitution of our common country." This plan of strategy was announced by Judge Amos R. Johnson in a very able speech delivered at the Court House in Raymond, Hinds County, on November 14, 1860.[13] The views expressed by Judge Johnson in his Raymond speech were, according to the *Vicksburg Whig* of November 27th, identical with those of Judge William L. Sharkey and other Union men. The plan proposed by Judge Johnson, in contradistinction to that of secession by separate State action as proposed

[12] MS.

[13] The Raymond speech of Judge Amos R. Johnson was made on the same day as the more famous one of Alexander H. Stephens before the Georgia Legislature at Milledgeville. The political views expressed in the two speeches are identical and in no respect whatever will Judge Johnson's speech suffer by comparison with that of the more illustrious Stephens. The address of Judge Johnson appears in the *Hinds County Gazette* for November 28, 1860; the *American Citizen* (Canton), December 1, 1860; the *Natchez Courier*, November 29, 1860. See Appendix B in the *Life of A. H. Stephens* by Johnston and Browne, for his Milledgeville speech.

by the ultra political leaders and the secession press led by the *Mississippian,* was that of co-operation of all the slaveholding states. With reference to secession, Judge Johnson, in the first place, recognized no such right springing from the Federal Constitution. To recognize such right, said Judge Johnson, would make the "Constitution a 'rope of sand' having no strength or cohesiveness." Judge Johnson adhered to the idea that secession was revolution; that it was an act of rebellion against constituted authorities. He admitted that revolution was the "glorious right of all people groaning beneath the yoke of oppression" and he said that he would willingly appeal, as a last resort, to that remedy "rather than bow my neck to the yoke of oppression." If it became necessary, said Judge Johnson, for the South to resort to revolution in order to obtain equality in the Union, it was paramount to have the co-operation of all the slaveholding States. "I deprecate," said the Judge, "all separate State action. The idea of 'precipitating the cotton States into a revolution,' leaving their sisters of other slaveholding States in the Union, not even consulted as to the final movement involving the interest of all, is not for a single moment to be entertained. Co-operation—calm, deliberate co-operation—of the whole section, is the only course we can pursue for a proper adjustment of our affairs." Judge Johnson said further touching the same point:

> Separate secession, State by State, and some of the slaveholding States maintaining their positions in the Union, would inevitably lead to civil war and carnage. If we act on the principle of co-operation, and are finally forced to revolutionize the government, we shall go out of the Confederacy as an unit, with sufficient physical strength and moral force to maintain ourselves. By co-operation, in the mode indicated, we may secure a bloodless revolution, should we, unfortunately, be driven to that last resort belonging to oppressed humanity.

The specific plan of co-operation suggested by Judge Johnson was that conventions in the several slaveholding States having been called by specially convened legislatures, the people should "calmly and deliberately resort to the ballot-box and select delegates who will faithfully reflect their sentiments." The conventions in the several slaveholding States having met, should, acting in concert, provide speedily for a Southern Convention of all the slaveholding States to consider the interest of the South involved in the sectional struggle. This proposed Southern Convention was to be made up of delegates selected by the several State conventions and was to have full power to act finally and effectually. The Southern people were to demand, through this convention, the "full measure of our rights under the Constitution, not more nor less." The people of the North, seeing the South united and

that her demands were just, would probably give "us the reasonable guarantees which we are clearly entitled to, and thus save us and themselves from the horrors of revolution and bloodshed." At any rate, it was argued, such a Southern Convention would bring together the talent, the intelligence, and the spirit of the Southern masses; and it would embody, in tangible, systematic, and authoritative form, the sovereign will of the South, influenced by such conservative elements as existed in the section. Such a final offer of nationality and peace based on Southern equality would, if refused by the North, unite the South and justify her before "all Christendom" for any consequences which might follow.

On the 14th of November, also, Governor Pettus issued a call convening the Legislature into extraordinary session on the 26th, in order that Mississippi might be able to take into "consideration the propriety and necessity of providing surer and better safeguards for the lives, liberties, and property of her citizens" than had been found or were to be hoped for, in "Black Republican oaths." With a view to securing counsel as to the nature of the message which he should deliver to the Legislature when it convened, Governor Pettus called the Mississippi delegation in Congress to meet with him in the city of Jackson on November the 22nd. The conference took place as scheduled and was attended by all the delegation except John J. McRae, who was unable to be present on account of the serious illness of his wife.[14] The principal question considered in the conference was whether the Governor should recommend to the Legislature a program of co-operation, after the manner of that proposed by Judge Amos R. Johnson, or one of secession by separate State action. The State's representatives in Congress, with the single exception of Jefferson Davis, agreed with the Governor that his message to the Legislature should recommend secession by separate State action. Davis alone held out for co-operation, but, seeing the majority against him, expressed a willingness to go with his State in whatever course she might take.[15] Davis, referring to the meeting of the Mississippi delegation with the Governor, said:

> In November 1860 the Governor of Mississippi having issued his proclamation for the extra session of the Legislature to consider the propriety of calling a Convention to prepare an ordinance for the secession of the State from the Union, invited the U. S. Senators and the Representatives to meet him in consultation as to the character of the message he should send to the Legislature when it

[14] *Mississippian,* Dec. 5, 1860. A letter from McRae to the editor of the *Mississippian* under date of Nov. 19, 1860 declares for secession by separate State action.

[15] O. R. Singleton to W. T. Walthall, July 14, 1877; Rowland, *Op. Cit.,* Vol. VII, p. 250.

assembled. While holding in common with my political associates that the right of a State to secede was unquestionable, I differed with them as to the probability of being able peaceably to exercise the right. The knowledge gained . . . in the War Department showed to me more clearly than to many others the total lack of preparation in the South for war. The foundries and the armories were in the Northern States and there all the new and improved arms were deposited. In the arsenals of the South and Southwest were to be found the old and rejected models. . . It was quite plain, therefore, to me that if we should be involved in war, the odds against us would be far greater than was due merely to an inferiority of population; and holding that secession was the precursor of war between the States, I was naturally more slow than others entertaining a different opinion, to resort to that remedy. While engaged with this consultation with the Governor, a telegraphic message was sent to me by a member of Mr. Buchanan's cabinet urging me to go to Washington 'immediately.' This dispatch was laid before the Governor and the State's representatives in conference with him, and it was decided that I should comply with the request. . . . It was stated to me afterwards that my associates considered me 'too slow' and it was probably true that they were right in their belief that I was behind the opinion of the people of the State as to the propriety of a prompt secession.[16]

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[16] MS. Personal Reminiscences of Jefferson Davis, Confederate Memorial Hall, New Orleans, Louisiana.

MS. The Mississippi Convention 1865, petitioned Andrew Johnson for the release and pardon of Jefferson Davis. The petition was signed by ninety-four, including William L. Sharkey, of the ninety-eight members, and recited among other things that "Most of us voted against secession and for years opposed the States Right party. Yet none of us doubted that Mr. Davis acted upon an honest and sincere conviction. . . . He was loath to resort to a disruption of the Union as a mode of remedying what he thought to be wrongs in the past and of guarding against others, and more grevious wrongs, which he believed to be impending. After the Convention assembled in this State and passed the Ordinance of Secession, he left the Senate of the United States reluctantly, and with sorrow. . . It was well known to our people, that he was not among the most ardent of his political associates." Johnson Papers, Vol. 74, pp. 6175-6177.

John H. Harmon, in what appears to have been a series of newspaper articles on his Recollections of Public Men, gives a very interesting description of a gathering of Southern senators and representatives early in December 1860, at Arlington, the home of Robert E. Lee. The meeting described was not a prearranged one but rather the usual week-end visit, after the close of the session on Friday, to Arlington where "simple and elegant hospitality was dispensed." There were present at the meeting described: John Y. Mason, Howell Cobb, Jacob Thompson, Ben Hill, John Slidell, Jefferson Davis, John C. Breckinridge, Governor Letcher and ex-Gov. Smith ("Extra Billy") of Virginia, John B. Floyd, Henry A. Wise and Clement C. Clay, and others. The question of the hour, that of secession, was brought up "at Col. Lee's dinner table," by John Slidell, much to the embarrassment, not to say disgust, of Col. Lee. General speech-making followed. The writer says that "Jefferson Davis also spoke, but he did not urge secession. He did not oppose the palmetto flag (as proposed by Slidell for the flag of the new republic) but suggested that the stars and stripes be retained as the colors, and the idea be revolution, not rebellion . . . Jeff Davis was, after Breckinridge and Lee, the mildest in views of any man in the assembly." (From a newspaper clipping found in the private papers of Jefferson Davis, Confederate Memorial Hall, New Orleans, Louisiana.)

The message of Governor Pettus to the Mississippi Legislature which convened, according to the call, on November 26th, recited in some detail the Northern acts of hostility towards the institutions of the South and, in words of warning, pointed out the very grave dangers resulting from the election of Lincoln. The Governor found the means of deliverance from the great danger in "the reserved rights of the States to withdraw from injury and oppression"—a reserved right, the Governor said, provided by the founding fathers for "just such an emergency as this." In the reserved right to secede from injury and oppression, the Governor found embodied the "soul of American liberty" and the "great saving principle" to which alone the Southern States could "look and live." But these great "saving principles" in American politics must, according to the Governor, "perish under Black Republican rule." Hence, to employ the Governor's metaphor, Mississippi—and by implication the other slaveholding States—must

> go down into Egypt while Herod rules in Judea; it is the only way of saving the life of this Emmanuel of American politics, and when in after years it shall be told you that they who sought the life of this Prince of Peace and the Fraternity are dead, you may come up out of Egypt and realize all the fond hopes of patriots and sages, of peace on earth and good will among men, under the benign influence of a re-united government, deriving its just powers from the consent of the governed.[17]

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[17] *Vicksburg Sun*, December 3, 1860, contains the message in full.

The idea that the seccession of the Southern States would be temporary, pending the granting of suitable guarantees by the free States, seems to have been rather prevalent in Mississippi for six months after Lincoln's election:

MS. J. S. Johnson to Stephen A. Douglas, Carrollton, Mississippi, December 11, 1860. ". . . I write to inform you what the state of public sentiment is in Mississippi; it is disunion and nothing else. The people love the Union yet, but they have lost all hope of peace and safety in it, and are willing and determined to seek peace and safety out of it. A majority perhaps expect that it will be reconstructed if any change should be made in the heart of the Northern people that would influence them to be kind and just to us, as we have ever been to them. The Puritans of New England will never live at peace with any people that differ with them in opinion and their fanaticism we know is too persistent in its character to be overcome by reverses and defeats. We cannot live at peace with New England. But the great Northwest is by nature our ally. It would seem that your country and ours were made for the mutual benefit of each other, and reconstruction of this union with your section of the country seems to be necessary for both parties."

A. H. Handy, Commissioner from Mississippi to Maryland, in a speech at Baltimore on December 19, 1860, emphasized the possible temporary secession of the Southern States. "We do not propose to go out of the Union for the purpose of breaking up this government," said Handy. "On the contrary we go to preserve in their purity the institutions which our fathers gave us. We want no new Constitution; no new laws, nor new Supreme Court decisions. We will take with us all that we now have, and say to the aggressive States of the North, when you can learn to respect this sacred instrument, and will mark your sincerity by conceding to us new and sufficient guarantees, we will gladly renew our fraternal relations with you—deny us that right, and we will form a

The Legislature, in the spirit of the Governor's address passed a number of resolutions looking towards the secession of the State and providing for its co-operation with the other slaveholding States which were, like Mississippi, threatened by Northern hostility. One of these resolutions declared secession to be a reserved right of the States in case of oppression by the Federal government; arraigned the Northern States in a long bill of indictment rivalling that in the Declaration of Independence against George III, charging, in general, an unalterable determination to destroy the institutions of the South; and resolved that the proper remedy for the impending injuries was "the secession of each of the aggrieved States." The Governor was requested, by resolution, to appoint Commissioners to visit each of the slaveholding States, whose duty it should be to inform State Legislatures, if convened, that Mississippi had called a Convention to consider the "threatening relations between the sections," which relations were "aggravated by the recent election of Lincoln"; and to urge each of the slaveholding States to co-operate with Mississippi in the "adoption of efficient measures for their common defense and safety." If the Legislature of any State had not been convened, the Commission was to appeal to the Governor to call the Legislature together that its co-operation might be immediately secured. The Legislature likewise authorized and requested the Governor, together with certain other State officers, to prepare a device for a Coat-of-Arms for the State of Mississippi and to have the same properly engraved after it should have been adopted by the State authorities. The legislative act authorizing a Convention of the people of Mississippi provided that the election for delegates to the Convention could be held in the several counties on Thursday, the 20th of December, 1860. Each county was to be represented in the Convention by the same number of delegates as such county had in the House of Representatives. The act provided that the Convention should assemble in Jackson on January 7, 1861. The purpose of the Convention, as set out in the act, was "to consider the then existing relation between the government of the United States and the government of the people of the State of Mississippi, and to adopt such

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Southern Confederacy and endeavour to maintain our rights independently of you. . . . " The Commissioner added that he felt that when each of the slaveholding States had withdrawn, each for itself, there would be no difficulty in obtaining from the North the necessary guarantees. For a full report of Handy's speech, see the *Baltimore Sun* and the *Baltimore American and Commercial Advertiser* for December 20, 1860.

MS. Jefferson Davis says that as late as February 1861 there was "in the mind of many the not unreasonable hope" that the "saner thoughts and better feeling of the Northern people" would compel suitable guarantees for the South and thereby a reunited nation. See miscellaneous papers in the Private Papers of Jefferson Davis, Confederate Memorial Hall, New Orleans, Louisiana.

measures for the vindication of the sovereignty of the State and the protection of its institutions as shall appear to be demanded."[18]

Following the election of Lincoln, the drift of the current in Mississippi for immediate secession was so great as almost to overwhelm the staunchest of Union men. The *Mississippian,* the *Reveille,* the *Woodville Republican,* the *Vicksburg Sun,* the *Natchez Free Trader,* and other less important secession newspapers poured out volleys of abuse against those who counselled delay or who would not readily subscribe to the sentiment, "our country, right or wrong." The policy of waiting for an "overt act" was declared to be one of "imbecility and disgrace" thoroughly out of keeping with the spirit of the "brave and noble revolutionary fathers," who had "smelt the 'approach of tyranny in the tainted breeze' and resisted the first experiment upon their liberties."[19] According to the *Free Trader,* those who opposed the secession party were "open enemies of Mississippi and the South." All such, said the editor, were "traitors in the camp" and would soon be regarded and treated as were the "Tories in the Revolution."[20] The *Woodville Republican* deplored that there still were to be found a small minority of partisans for the Union, and asserted that any such who counselled aloofness from or opposition to the "great question of Southern Rights, would fight with his brothers over the corpse of his mother for her jewels."[21] The *Mississippian* branded the policy of co-operation as a "shallow and transparent humbug" concocted by a small Union faction who, not daring openly to advocate "abject submission," was attempting to subvert the will of nine-tenths of the people of the State who were in favor of secession by separate State action as the only safe course.[22] Under the combined pressure, therefore, of the admitted danger in Lincoln's election to the State's institutions, and the dragooning by the secession press, the Union forces began to give way. Companies of "Minute Men" sprang up in almost every county and "the gray beard and the stripling" stood side by side in the ranks. The "blue cockade" likewise appeared in nearly all the counties and was worn by large numbers of people as evidence that they were for immediate secession and no submission to "Lincoln and the free negro Hamlin."[23] The current of secession was moving fast and the best of

[18] The Resolutions and Acts of the Special Session of the Mississippi Legislature for 1860 are found in *Laws of Mississippi* 1859-60-61-62. See the Laws of 1860, pp. 31-45.

[19] *Natchez Free Trader,* November 28 and December 1, 1860.

[20] November 23 and 24, 1860.

[21] *Natchez Free Trader,* Nov. 24, 1860 (Quoting editorial in *Woodville Republican* of Nov. 20, 1860.)

[22] November 21 and 28 and 29 and December 1, 1860.

[23] *Mississippian,* November 29 and December 5, 1860.

Union men had difficulty in keeping their course. Some of the friends of the Union were overwhelmed, as faithful helmsmen driven from their posts by the fury of a resistless tempest, and joined the ranks of the ultras. "I find myself," wrote T. S. Dabney, "drifting from my old moorings without the ability to stop or conjecture as to the position I may find myself in on the morrow." Although, as Dabney said, his name appeared as one of the callers of the Union mass meeting convened at Vicksburg on November 29, 1860, he was no longer "a Union man in the sense in which the North is Union."[24] On the whole, it was certainly true that by December 1, 1860, the majority of the agencies which molded public opinion in the State had accepted the conclusion of A. G. Brown: "The Union is dead and in process of mortification, and nothing now remains to be done but to bury the rotten carcass."[25]

The importance of the churches as a factor in crystalizing opinion for the secession of Mississippi is not insignificant. Like the dyer's arm which took on the color of the material in which it worked, the churches of the State, in the controversy over secession, were true reflections of the social and economic system in which they lived. In other words, the age-old liaison between organized religion and the dominant social and economic "set up" of society is well illustrated by the opinions and attitudes of Southern churches with reference to the institution of slavery.[26] In the crucial days between the election of Lincoln and the secession of Mississippi, the "ministers of God, inspired like the prophets of old," brought to bear the "batteries of religion," even as did the "preachers in the days of '76," upon the enemies.[27] The eloquent and pious divines, Dr. B. M. Palmer and Dr. Leacock of the Presbyterian and Episcopal churches of New Orleans, availing themselves of the occasion presented by Thanksgiving Day, delivered discourses to their congregations, fashionable and rich in lands and merchandise, in which they zealously defended the institution of slavery upon high moral and religious grounds and advocated secession from the Union as a protective measure against the on-

[24] T. S. Dabney to W. Thurmond, Esq., Burleigh, Hinds County, November 25, 1860.

[25] Speech of A. G. Brown at Jackson, reported in *Vicksburg Whig,* November 28, 1860.

[26] Stanton, R. L.—*The Church and the Rebellion,* New York, 1864, is one of the best treatments of the influence of the Church as an agency for creating a public opinion for secession. Dr. Stanton succeeded to the Presidency of Oakland College upon the assassination of Dr. Chamberlain on Sept. 5, 1851, a tragedy which resulted from the violence of political and party zeal in the State during that year. Dr. Chamberlain was a Whig and a Union man and his assassin, George A. Briscoe, was a Democrat and a fanatical secessionist.

[27] *Natchez Free Trader,* December 4 and 5, 1860.

slaughts of the Abolitionists.[28] Dr. Palmer's sermon, especially, was printed generally and in full by the secession press of Mississippi. The *Natchez Free Trader* declared that Dr. Palmer's sermon "ought to be printed in letters of gold and spread wide-cast among the people" because some people "turn away from the truth when declared by State-Rights politicians and Legislatures" but that they would be slow to reject the words of so "eminent a minister of religion."[29] The Rev. William Mercer Green, in a long and well-written Pastoral Letter "To the Clergy and People in the Protestant Episcopal Church of the Diocese of Mississippi," admitted that "the dismemberment of a great nation is a thing that cannot be regarded but in the most serious light" and that it was his "hearty desire that an overruling Providence . . . keep us a united people"; yet, said the Bishop, "my fears prevail over my hopes. The restless, insubordinate, and overbearing spirit of Puritanism still raging in our public councils, as well as among a large portion of our people, furnishes excuse, if it does not fully justify our fellow citizens in pronouncing with almost one voice that our differences are irreconcilable."[30]

The *Mississippi Baptist,* official publication of that large denomination in the State, was in serious quandary as to what to advise in view of Lincoln's election, saying,

> We are the stern uncompromising friends of the slave and of slavery. We believe the one is in the position for which God intended him, and the other we believe to be not only a divine permission but a divine appointment. We believe also that the opposition to slavery, especially political opposition, is not only the offspring of a misguided judgment, but that it is in itself, the worst form of fanaticism. How is this fanaticism to be met, and its influence counteracted? How are its further encroachments to be prevented? We know of no other way than by firm resistance. Let every Southern man insist upon his rights IN the Union, or let him seek them OUT of it. This we regard as our duty to ourselves, our country, and our God.[31]

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[28] *Ibid. Dr. Palmer's* sermon appears in full in the Mississippian Dec. 12, 1860. See also *Natchez Free Trader,* Dec. 4 and 5, 1860.

[29] *Natchez Free Trader,* December 4, 1860.

[30] The *Vicksburg Whig,* Dec. 29, 1860. The Catholic Bishop of the Diocese of Natchez, in an Episcopal Circular, avoided any discussion of the acute political situation raised by the election of Lincoln, merely counseling "fasting, alms, and prayers to God for his merciful guidance and protection." See, *Natchez Free Trader,* December 8, 1860.

[31] *Eastern Clarion,* December 5, 1860. (Quoting the *Mississippi Baptist.*)

MS. For the expression of similar views, see Resolutions and Resolves of Bethseda Baptist Church, Oktibbeha county, "Done in Conference Saturday before the first Sunday in December A. D. 1860," *Governor's Records,* Correspondence of Gov. Pettus, Series E, Vol. 49.

The Baptist State Convention which met in Macon May 23, 1861, unanimously

An effort at organized opposition to the secession movement in the State took place at Vicksburg on November 29, 1860. Although the call signed by a long list of prominent names for a State-wide Union mass meeting was heralded with suitable typographical display through the columns of the *Vicksburg Whig* and the *Natchez Courier* for ten days before the Convention assembled, it was not largely attended. No primary meetings in the counties responded, and but four out of the sixty counties, namely, Hinds, Rankin, Adams, and Warren, were represented.[32] Those in attendance, however, were men of great prominence and respectability. The Convention adopted resolutions declaring that there were yet sufficent remedies within the Union to protect the interests of the South and that until such remedies had been tried and found wanting, there should be no secession, and not even then except by co-operation of all the slaveholding States.[33] Judge William L. Sharkey, among other prominent Union men, addressed the Convention. The *Vicksburg Sun,* reporting Sharkey's speech, said that

> He then took up the ga-lo-ri-ous Union, caressed and embraced it in the most paternal and maternal manner. He held it up naked to his audience, and asked his auditors to join in his overflowing glory of its beauty, symmetry, and God-like appearance. He denounced peaceable secession with bitter invectives. He asked pardon for saying 'SECESSION,' he could not and would not call it anything but 'BLOODY REVOLUTION.' Secession in his judgment is 'no remedy at all,' but would make the affairs of the South worse than they are now. Here he informed the audience that he 'would run too far if he went on,' but would conclude by gratuitously handing down to the present and future generation 'his position.' . . . He compared the separate secession of the State to small, shaky yawl or smack at sea without oars, sail or rudder. . . He next astonished his hearers by telling them that 'the Great Father of Waters' was owned by the Northwestern people, and that they CONTROLLED it. The speaker expressed his firm purpose not to go out of the Union unless the Border States went out with him, . . . 'so help me God, I will NOT go out of the Union willingly unless it be with the border States.' "[34]

The object of the Union mass meeting at Vicksburg was to check the current in the State for separate State secession and to turn the tide

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adopted the resolutions which had been recently passed by the Southern Baptist Convention at its meeting in Savannah, Georgia, enthusiastically approving secession. *Proceedings of Mississippi Baptist State Convention,* 1861.

[32] *Mississippian,* December 5, 1860.

[33] *Vicksburg Whig,* November 30, 1860.

[34] *Vicksburg Sun,* December 3, 1860. For other reports of the Union meeting at Vicksburg, see *Natchez Free Trader,* December 30, 1860; *Natchez Courier,* December 3, 1860; *Mississippian,* December 5, 1860; and *Eastern Clarion,* December 12, 1860.

in favor of co-operation with all the slaveholding States. The resolutions adopted at the Union meeting served as the basis for the Union primary meetings in the counties and sharply joined the issue with separate State secessionists in the canvass for delegates to the Convention which was to assemble at Jackson on January 7, 1861.

SOME OBSERVATIONS ON AMENDMENTS TO MUNICIPAL CHARTERS

WILLIAM HEMINGWAY*

An examination of the statutory law of Mississippi relating to amendments to municipal charters may lead one to the conclusion that the constitutional requirement that amendments be made only by general laws is being very largely disregarded by the Legislature. But an analysis of the many laws passed will disclose that the Legislature has acted within its authority in most cases. One reason why most of these laws are considered local is the custom of the Legislature of referring bills to amend municipal charters to the committee on local and private legislation. The very act of reference to this committee would seem to indicate that the constitutional requirements of a general law is being disregarded.

The framers of the Constitution of 1890 had in mind a uniformity of the charters of the municipal corporations and a continuation of legislative control; and, as a result, they enacted Section 80 of the Constitution, which reads:

> "Provision shall be made by general laws to prevent the abuse by cities, towns, and other municipal corporations of their powers of assessment, taxation, borrowing money, and contracting debts."

It will be noted that this section refers entirely to financial affairs. It is followed by Section 88, which reads:

> "The legislature shall pass general laws, under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to repeal or amendment."

In conformity with the requirements of Section 88, the Legislature enacted a plan of amendment for municipalities not under the Code Chapter.[1]

Section 88 is prospective only, and it did not repeal existing Mississippi municipal charters.[2] The Code of 1892 provided that unless within twelve months a municipality should elect not to come under the provisions of the Code Chapter, it would be governed by

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* Professor of Law, University of Mississippi.

[1] *Code of 1930*, Sect. 2625.

[2] *Lum* v. *Vicksburg*, 72 Miss. 950, 18 So. 476

that chapter. There at once sprang up a large number of Code charter cities or municipalities as contrasted to the private charter municipalities. The Legislature did not itself undertake to make all amendments to Code charter cities, but made provision,[3] how amendments should be made by all municipalities under the Code Chapter.

In considering the acts of the Legislature, it would be well to give attention to the question of whether or not all of the acts are amendments, and, therefore, should be enacted only by general laws. A study of these laws will make it manifest that there are certain problems that apply to only one municipality and involve only one matter. Therefore, the Legislature, in its wisdom, has passed a special act to cover that particular situation.

A number of states have laws similar to section 88, and the courts have construed that section. To illustrate, in declaring unconstitutional an Act of the Assembly of Pennsylvania of April 18th, 1828, which read:

> "in all counties of this Commonwealth where there is a population of more than 60,000 inhabitants, and in which there shall be any city incorporated at the time of the passage of this act, with a population exceeding 8,000 inhabitants, at a distance from the county seat of more than 27 miles by usually travelled public road, it shall be the duty of the president judge or of the additional law judge, or of either, to make an order providing for the holding of one week of court for each regular term of court of said county, for the trial of civil or criminal cases in such city,"

the Pennsylvania court said:

> "This is classification run mad. Why not say all counties named Crawford with a population exceeding 60,000 and containing a city called Titusville with a population of over 8,000 and situated 27 miles from the county seat, or of counties with a population of over 60,000, watered by a certain river or bounded by a certain mountain."[4]

We find many laws almost exactly in line with this Pennsylvania statute, which sound general, but in their effect are special only. Cities, however, may be classified, and general laws passed to control each class, or each form of government. For example, laws may be passed for a commission form of Government, and need not operate upon an aldermanic system. Such laws are not violative of the Constitution.[5] But the laws must be general for a particular class. The Mississippi Supreme Court has spoken very definitely on this matter in construing

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[3] *Code of 1930,* Sect. 2625.
[4] *Commonwealth ex rel. Furtig et al.* v. *Pattan et al.,* 85 Pa. St. 258.
[5] *Mayor and Board of Aldermen of City of Jackson* v. *Slate,* 102 Miss. 663, 59 So. 873.

an amendment to the charter of Meridian, creating a police commission or board.[6] Meridian, not being a Code Chapter city, could have acted under the general law on amendments as provided in the Code.

Yazoo City was a special or private charter town, yet it amended its charter to provide that it might own and operate an electric railway.[7] The court held that acting under the Code of 1906, Sec. 3444, the municipality might make its own amendments provided the amendments were not in conflict with the laws of the Constitution of the United States or the Constitution of the State, though they are inconsistent with the Code Chapter, entitled "Municipalities."

In *Yazoo City* v. *Lightcap,*[8] the court held that for all municipalities acting under the Code Chapter, the charters must be the same throughout, and for municipalities not acting under the Code, the contents of each charter or each amendment must be prescribed minutely by the Legislature. But the law does not require that such general laws shall actually contain the entire contents of municipal charters or amendments thereto. The court held that the act of Yazoo City in making an amendment under the provisions of the Code Chapter, was not unconstitutional, although the amendment had no reference to other municipal corporations.

Had the Legislature acted upon this matter it must have done so by a general act and grant of power; but by general law it supplies to all of a class—that is, those not under the Code Chapter—special amendments, which may be made affecting only one municipality; while for the Code Chapter municipalities, the Legislature must be the only amending power.

It may be interesting to observe some of the acts which have been passed by the Legislature. For example, Ackerman may assign its indebtedness to the First National Bank of Ackerman.[9] Is this a charter amendment? If so, it should not apply to Ackerman alone. Perhaps all municipalities should be authorized to assign their indebtedness to the First National Bank of Ackerman. Carthage was authorized to levy a special school tax.[10] Clinton may levy a special tax to exterminate the Argentine ant.[11] Hattiesburg has been allowed to furnish and equip a high school cafeteria.[12] Mendenhall has been

[6] *Laws of Mississippi,* 1900, Ch. 134, p. 173; *Monette* v. *State,* 91 Miss. 662, 44 So. 989.
[7] *Love* v. *Yazoo City,* 91 Miss. 535, 44 So. 835.
[8] 82 Miss. 148, 33 So. 949.
[9] *Laws of Mississippi,* 1922, Ch. 379, p. 429.
[10] *Ibid.,* 1920, Ch. 456, p. 542.
[11] *Ibid.,* 1926, Ch. 493. (Since 1922 these acts have not been included in the bound edition of the laws, since they are considered local.)
[12] *Ibid.,* 1924, Ch. 409.

authorized to purchase a site for a cotton gin and ice plant.[13] Tupelo was authorized to issue bonds to purchase the Y. M. C. A. property.[14] Crenshaw was permitted to sell part of Front street.[15] Jackson was given authority to transfer the proceeds of a bond sale from the fund of the Third Ward fire station to the general fund.[16] Other similar acts might be enumerated indefinitely.

It will be noted that most of these acts relate to finances. Under Section 80 of the Constitution, it is within the power of the Legislature to prohibit abuses by municipal corporations of certain of their financial powers. True, such regulation must be by general law, and it is evident that the acts mentioned above are local. It is suggested, however, that although some of these acts are unconstitutional as a result, others do not come within the strict letter of this section and are not invalidated by it. Let it be remembered that the section refers only to "powers of assessment, taxation, borrowing money and contracting debts"; special laws as to other subjects are permitted by it.

It is also very doubtful if any of these acts would be considered as charter amendments and as invalidated by Section 88. Continuing power is not given in most of them, but the power is exhausted by one act. They would, therefore, not seem to rise to the dignity of amendments to the charter.

In 1920, the Legislature provided that the town of Ackerman might borrow money for public schools.[17] Section 80 refers expressly to borrowing money and contracting debts, and says that such must be authorized by the general laws. The power to issue bonds and incur debts has been given by special acts to Amory, Bay St. Louis, Biloxi, Brandon, Brookhaven, Byhalia, Clarksdale, Cleveland, Coldwater, Columbus, Crystal Springs, Drew, Goodman, Greenwood, Grenada, Gulfport, Hattiesburg, Hazlehurst, Holly Springs, and approximately thirty others.[18] The question might well be asked, if there are so many special laws required and the right to borrow money and issue bonds is individual, why not a general law as the Constitution requires? The majority of these acts might not be amendments in a correct definition of an amendment. They all relate to legislative or financial matters and borrowing money and contracting debts, which the Constitution says must be by general law.

The plan of the constitution makers and codifiers for all municipalities to operate under the same general law has been so used as to

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[13] *Ibid.*, 1926, Ch. 677.
[14] *Ibid.*, 1916, Ch. 325, p. 470.
[15] *Ibid.*, 1914, Ch. 463, p. 497.
[16] *Ibid.*, 1922, Ch. 332, p. 403.
[17] *Ibid.*, 1920, Ch. 309.
[18] For others see the Appendix to *Hemingway's Code, Supplement* (1921).

create many classifications of municipalities, not contemplated by the makers of the Constitution. There are many kinds of municipalities in Mississippi: (1) the Code Chapter corporations; (2) the commission government municipal corporation with the Code annexed as a part of the charter, such as Jackson; (3) the commission form of government annexed to its private charter, of which Meridian is an example;[19] (4) numerous private or special charter municipal corporations; (5) the private charter with a few features of the commission government plan, such as Vicksburg; (6) the commission government cities under the Laws of 1908. So we have more different kinds of municipalities than we had when the constitution framers undertook to make them all of one kind.

Under Sections 80 and 88 of the Constitution, general laws are required only as to especially enumerated financial matters and amendments. It would appear that these two sections should be construed strictly, and that all local laws not clearly coming within their express terms should be held constitutional. Although subject to a strict construction, these sections would nevertheless be sufficient to prevent an abuse by the Legislature of its powers; and there arise many instances outside of their terms where a legislative sanction is urgently needed to meet some pressing local condition.

This is a most interesting phase of legislative enactment, and its history should aid us in reaching some plan by which municipalities may be controlled by local laws.

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[19] These three forms are under the *Laws of Mississippi,* 1912, Ch. 260.

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NOTE AND COMMENT

THE "FAMILY PURPOSE DOCTRINE" AS RELATING TO AUTOMOBILES

With three very recent cases handed down by the state Supreme Court, Mississippi unqualifiedly joins the rank of the growing minority of states repudiating in its entirety the "Family Purpose Doctrine" in regard to automobiles. The substance of these cases, *Slaughter* v. *Holsenback*,[1] *Harrington* v. *Gough*,[2] and *Hobson* v. *McLeod*[3] was definitely expressed in the first mentioned case by the concise statement: "The Family Purpose Doctrine in respect to automobiles is repudiated in Mississippi."

The principle of the Family Automobile Doctrine had its beginning in the case of *Daily* v. *Maxwell*,[4] a Missouri case, and has since been adopted by the majority of the state courts rendering opinions on the question. This court, as well as the courts later adopting the view,[5] reasons that where one provides an automobile for the purpose of furnishing members of his family outdoor recreation, and for general family purposes, the use of the car for such purposes by a member of the family is within the scope of the owner's business, analogous to the furnishing of food and clothing to the family or ministering to their health; and that a child or other member of the family, other than the owner, who drives the car while containing either members of the family or third parties, for the convenience of a member or members of the family, with the general consent of the owner, may be regarded in so doing as carrying out the purposes of the owner, for which the car is maintained, thus rendering the owner liable for the negligent driving of the child or member of the family on the principle of agency. This view, according to a Federal case, *Denison* v. *McNorton*,[6] is not even affected by the fact that the car, during business hours, is used for business purposes.

The extent to which the liability of the head of the family for the tortious acts of dependents has been carried, in the various states, is well illustrated in the following syllabi of cases selected from opinions supporting the Family Purpose Doctrine in regard to automobiles:

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[1] 165 Miss. 161, 147 So. 318 (1933).
[2] — Miss. —, 145 So. 321 (1933).
[3] 165 Miss. 853, 147 So. 778 (1933).
[4] 152 Mo. App. 415, 133 S. W. 351 (1911).
[5] Texas, Oregon, Minnesota, North Carolina, North Dakota, Vermont, West Virginia, Connecticut, Colorado, Tennessee, Indiana, Missouri, Kentucky, and Illinois.
[6] 228 Fed. 401 (1916); Dist. Ct. U. S. Northern District of Ohio.

"Owner is liable for negligence of member using family automobile."[7]

"Owner maintaining automobile for general use of family is liable for negligence of member of family while using automobile as family automobile."[8]

"Under Family Purpose Doctrine the head of the family who maintains an automobile for pleasure, convenience, and use of family is liable for negligent operation of automobile while it is being used by members of family for their own pleasure."[9]

"The owner of an automobile is not relieved from liability under the Family Purpose Doctrine by the mere fact that the negligent use of the car was made by an adult son."[10]

"Under the Family Purpose Doctrine, a widow having control of deceased husband's automobile, which was kept for family use, held liable for negligence of minor son while he was using the car for social purposes."[11]

"Under the Family Purpose Doctrine the consent of parent may be implied from circumstances."[12]

Declining to repudiate the doctrine in its entirety, but, at the same time, refusing to place absolute liability on the head of the family for tortious acts of family members, some states[13] have placed certain restrictions on the doctrine. These states could not be listed either as "adoption" or "repudiation" states, although the existence of the theory is fully recognized as evidenced by the following excerpts from syllabi in cases decided by courts in the state taking this "restricted" view of the doctrine:

"If car was operated by adult self-supporting daughter for own purposes, father is not liable under the Family Purpose Doctrine."[14]

"Father of automobile driver held not responsible for injuries, where there was no allegation nor proof that driver was under twenty-one years of age, or was acting as father's agent."[15]

"One indispensible requisite of the Family Purpose Doctrine is that the person, on whom liability for injuries to another is sought to be fastened thereunder, owns, maintains, or provides automobile for general use, pleasure, and convenience of his family."[16]

"Family Purpose Doctrine does not apply to operation of Mother's automobile by adult son though with Mother's consent."[17]

"Family Purpose Doctrine in its broadest sense does not obtain,

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[7] *Hugh* v. *Kirch,* 105 Conn. 429, 135 Atl. 568 (1927).
[8] *Maher* v. *Fahy et al.* (Conn.) 151 Atl. 318 (1930).
[9] *Jones* v. *Knapp* (Vermont) 156 Atl. 399 (1931).
[10] *Watson* v. *Burley et al.* (West Va.) 143 S. E. 95 (1928).
[11] *Boyd* v. *Close et al.* (Colorado) 257 Pac. 1079 (1927).
[12] *Grier* v. *Woodside et al.* (North Carolina) 158 S. E. 491 (1931).
[13] Georgia, Arkansas, Kentucky, Connecticut, and District of Columbia.
[14] *Creaghead* v. *Hafele's Admr.* (Ky.) 32 S. W. (2nd) 997 (1930).
[15] *Malcolm* v. *Nunn et al.* (Ky.) 10 S. W. (2nd) 817 (1928).
[16] *Euster* v. *Vogel* (Ky.) 13 S. W. (2nd) 1028 (1929).
[17] *United States Fidelity and Guaranty Co.* v. *Hull* (Ky.) 35 S. W. (2nd) 550 (1931).

though recognized in this state. The use of the father's automobile on a pleasure trip does not establish the relation of principal and agent, or master and servant, but makes son a gratuitous bailee and does not establish liability of father under the Family Purpose Doctrine."[18]

"Family Purpose Doctrine is restricted to automobiles maintained by head of family for comfort, pleasure, and convenience of members of his family."[19]

"The Family Purpose Doctrine applies only where automobile belonging to head of family was acquired for general family use and was indiscriminately so used."[20]

One of the most bitter denunciations of the doctrine from a theoretical standpoint was given in one of the strongest cases on this point in the following excerpt from the able opinion:

"The doctrine has no firm foundation in reason or common sense. In theory it overlooks well settled principles of law, and in practice it would interdict the father's generosity, and his reasonable care for the pleasure or even the well being of his children by imposing a universal responsibility for their acts."[21]

In spite of the fact that quite a number of modern decisions follow the argument in the case just cited and quoted, yet it is very evident that the majority holding of the decisions is to make the father liable for an injury negligently occasioned by the family automobile, no matter who was driving it or for what purpose it was used. However, plausible excuses are seized upon not only to depart from the rule, but for its extension.

In an article in the *Virginia Law Review* reviewing the Family Purpose Doctrine, it is argued that the symmetry of the law would have been better preserved and such dodging and explaining avoided if the courts had at the outset held the automobile a dangerous instrumentality and based liability on that doctrine; or better still, should the law of master and servant be considered inadequate in automobile cases, if changes had been made by legislation as has been done in Massachusetts and other states.[22]

Though a very strong court has even gone so far as to state in a decision:[23] "The adoption of such a callously technical theory, that the head of the family is not liable because the agency was not a business agency nor the service a remunerative service, would be little short of calamitous," yet the trend toward repudiation of the Family Purpose Doctrine is becoming stronger as evidenced by the fact that quite a number of states which at one time adopted the doctrine have since either repudiated it, or else required facts other than the mere family relationship to be present before the head of the family will be held liable for the negligent acts of members of the family. The main ob-

[18] *Featherston* v. *Jackson* (Ark.) 36 S. W. (2nd) 405 (1931).
[19] *Mitchell* v. *Mullin et al.* (Ga.) 164 S. E. 278 (1932).
[20] *Rubenstein* v. *Williams* (Dist. of Columbia) 61 F. (2nd) 575 (1932).
[21] *Doran* v. *Thomsen,* 76 N. J. L. 754; 71 Atl. 296; 19 L. R. A. (N. S.) 335; 131 Am. St. Rep. 677 (1908).
[22] Ashley Cockrill, "The Family Automobile," 2 *Virginia Law Review,* 189.
[23] *Birch* v. *Abercrombie,* 74 Wash. 486, 133 Pac. 1020 (1913).

jection to the theory seems to be that the doctrine bases the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by family members. This proposition ignores an essential element in the creation of that status as to their persons—that such must be in furtherance of and not apart from the master's service and control—and fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs.

Though Mississippi has joined the ranks of the minority group by repudiating in its entirety the Family Purpose Doctrine in regard to automobiles, it can be well assured that it is a growing minority, caused by the trend of the times which constantly taxes the symmetry of the law, demanding variations to fit the evolutions of society.

Fred M. Glass.

RECENT IMPORTANT DECISIONS

CONFLICT OF LAWS—JURISDICTION—GARNISHMENT OF DEBT OWED BY NON-RESIDENT CORPORATION DOING BUSINESS IN STATE.

Complainant had obtained a decree in Illinois against the defendant Bean, whc was working in Alabama for the defendant oil corporation, which was organized under the laws of Delaware and doing business in Alabama and Mississippi. Complainant, upon a proper service on the agent of the oil corporation in Mississippi, seeks to garnish the wages of Bean. No service was had on Bean, nor did he appear. HELD: The wages may be garnished. *Bean* v. *Bean et al.*, — Miss. —, 147 So. 306 (1933).

This decision is in accord with what is, at the present time, probably the weight of authority.[1] Efforts to sustain the legal reasoning behind the result reached by it have generally failed, however. Such efforts have frequently been based upon an attempt to place the "situs" of the debt with the state where the debtor may be found. An analogy is drawn with jurisdiction over personal property, and it is said that, "Jurisdiction over the debtor gives as complete control over the debt as the physical presence of a piece of tangible property gives the court power of control over it."[2]

This view would have the court exercise over a debt exactly the same jurisdiction that it does in the case of a chattel. It overlooks the fact that a debt is nothing but a relationship between two parties and cannot exist independently of them. The truth of the matter is that due to this characteristic of a debt it can have no situs,[3] and that jurisdiction is not had upon it as such.[4] Control over the debt can therefore properly be exercised by the court only when it has jurisdiction over both of the parties and can thus regulate the relationship, decreeing, if necessary, that one party release the other or assign the debt. When the court has jurisdiction over the debtor alone, it cannot control the relationship; and it would appear on principle that the creditor's personal relationship to the debtor is not affected when no personal jurisdiction is exercised over him.[5] Attempts to place the situs of the debt at any other place are met with the same reasoning.

Recognizing to some extent that a debt can have no situs, the Supreme Court of the United States has nevertheless reached the result in the instant case by holding that garnishment proceedings may be brought wherever an action could have been maintained against the garnishee by the principal debtor, it being

[1] For cases involving garnishment of a corporation in a state where it is doing business, see annotation in 27 A. L. R. 1396.

[2] Carpenter, "Jurisdiction over Debts for the Purpose of Administration, Garnishment and Taxation," 31 *Harvard Law Review*, 905, at 913.

[3] Story, CONFLICT OF LAWS (7th Ed.) Sect. 362; 3 Beale, CASES ON CONFLICT OF LAWS, 507 (Sect. 25); *Thorne* v. *Watkins*, 2 Ves. Sr. 35; *Guilander* v. *Howell*, 35 N. Y. 657.

[4] A. L. I., RESTATEMENT, CONFLICT OF LAWS, Sect. 55.

[5] Beale, "Jurisdiction in Rem to Compel Payment of a Debt," 27 *Harvard Law Review*, 107, at 115.

considered that the creditor represents the principal debtor.[6] It is clear, however, that the creditor cannot be an actual representative of the debtor in this proceeding. The two have interests that are absolutely opposed and that banish even the thought of such relationship. In addition, if the one is the representative of the other, there would then be no reason for requiring the garnishee to give notice to the principal debtor in order to relieve himself of a double liability, as announced in *Harris* v. *Balk,* the case setting forth this view.[7]

It would appear, therefore, that from a logical standpoint the holding of the instant case is unsound.

Previous to 1911, the holding of the Mississippi Supreme Court was different. In *Bush* v. *Nance,*[8] it was announced that "where the garnishee is a non-resident, has in his hands no property belonging to the principal debtor, and owes him nothing payable within the state, the jurisdiction is defeated." This decision was followed by two others which applied the rule to a railroad company domiciled both in Mississippi, where the debt was payable, and a foreign state, where the garnishment proceedings were brought.[9]

In 1911, however, the case of *Southern Pacific Railroad Co.* v. *Lyon*[10] overruled the cases cited above, on the basis of the United States Supreme Court decision of *Harris* v. *Balk, supra,* which held that a judgment against a garnishee obtained in any state where the garnishee might be found at the time would be entitled to full faith and credit under Article IV of the Constitution, whether jurisdiction were had over the garnishee's creditor or not. Realizing that it would be "bound to follow the United States Supreme Court and . . . give full faith and credit to such valid judgment of a sister state under the Constitution of the United States," the Mississippi Court recognized that "it would be a very incongruous spectacle to have one line of decisions of the kind just specified repudiating *Railroad* v. *Smith* [*vid.* footnote 9], and another line of cases upholding it, where the facts were identical," and it therefore decided that it would cease to maintain a line of cases upholding that decision.[11]

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[6] "Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues. . . . The plaintiff in such proceeding in the foreign state is able to sue out the attachment and attach the debt due from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really, in such proceeding, a representative of the creditor of the garnishee, and therefore if such creditor himself had the right to commence suit to recover the debt in the foreign state, his representative has the same right, as representing him and may garnish or attach the debt, provided the municipal law of the state where the attachment was sued out permits it." *Harris* v. *Balk,* 198 U. S. 215, 25 S. Ct. 625, 49 L. ed. 1023 (1905).

[7] "It is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment."

[8] 61 Miss. 237 (1883).

[9] *Illinois Central Railroad Co.* v. *Smith,* 70 Miss. 344, 12 So. 461, 19 L. R. A. 577, 35 Am. St. Rep. 651 (1892); *Bucy* v. *Kansas City, M. & B. R. Co.,* 22 So. 296 (Miss., not off. rep.) (1896).

These three Mississippi cases apparently go on the basis that the situs of a debt is the state where it is payable, and that garnishment proceedings may be had there. As demonstrated above, a debt can have no situs; and the basis of the decisions is wrong. The actual holdings, however, were correct, as the courts in which the garnishment proceedings were brought did not have jurisdiction over the garnishee's creditor.

[10] 99 Miss. 186, 54 So. 728, 34 L. R. A. (N. S.) 234, Ann. Cas. 1913 D, 800 (1912).

[11] In this decision the court does go further and announce that it is "thoroughly satisfied of the correctness of the view of the United States Supreme Court," but

It is believed that the court properly refused to have two inconsistent lines of decisions and therefore was correct in adopting the rule in *Harris* v. *Balk* even when the garnishment proceedings are brought originally in Mississippi.

As the Mississippi Court is following the holding of the Supreme Court of the United States, it therefore becomes pertinent to ascertain exactly what is the holding of that Court at the present time.

The case of *Harris* v. *Balk* was based to a very large extent upon that of *Chicago, R. I. & P. R. Co.* v. *Sturm,*[12] and has been followed in two other cases.[13] There appear to be no other decisions by the Court directly in point, though there are numerous *dicta* supporting the view.

Certain recent decisions of the Supreme Court of the United States, however, have indicated that there is a possibility that the rule of *Harris* v. *Balk* has been overruled by implication and that it may be expressly overruled if a case is squarely presented.

These cases are concerned with the matter of taxation of debts (either a direct or an inheritance tax), which matter presents a similar problem to that of garnishment of debts: there is here also the question of jurisdiction over the debt. It has been shown previously that a debt can have no situs; and it is not properly taxable as a *res.* A personal tax may be levied upon the creditor because he has a right that is of value to him. No value exists for the debtor, however, and he should not be subject to taxation. In the case of an inheritance tax, likewise, the transfer is actually made in the state where the deceased creditor is domiciled.[14]

Contrary to this reasoning, in the case of *Blackstone* v. *Miller,*[15] it was held that "a state may tax the transfer, under the will of a non-resident, of debts due the decedent by its citizens," the reason being given that it is "the law of the place where the debtor is [that] will make him pay" and that "power over the person of the debtor confers jurisdiction." This decision was based to a large extent on the case of *Chicago, R. I. & P. R. Co.* v. *Sturm,*[16] a garnishment case holding that garnishment proceedings may be had at the domicile of the debtor. The case of *Blackstone* v. *Miller,* in turn, was cited in *Harris* v. *Balk* as authority for the holding in that case. It is therefore clearly evident that from the standpoint of the Supreme Court the two matters are closely connected and intertwined, being based upon the same theory.

A decision, therefore, that overrules entirely the previous holding as to jurisdiction for taxation might reasonably be taken as having some effect upon the holding as to jurisdiction for garnishment proceedings. Such decision has been rendered in the case of *Farmers' Loan & Trust Company* v. *Minnesota.*[17] Involving the facts similar to those in *Blackstone* v. *Miller,* this case expressly

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it could have reached the same decision without being so "thoroughly satisfied" as to the correctness of the view in the Harris case.

Subsequent cases following *Railroad* v. *Lyon* are *McPherson* v. *Matthews,* 143 Miss. 299, 108 So. 494 (1926), and *Bean* v. *Bean et al., supra.*

[12] 174 U. S. 710, 19 S. Ct. 797, 43 L. ed. 1144 (1899).

[13] *Louisville & N. R. Co.* v. *Deer,* 200 U. S. 176, 26 S. Ct. 207, 50 L. ed. 426 (1905); *Baltimore & Ohio R. Co.* v. *Hostetter,* 240 U. S. 620, 36 S. Ct. 475, 60 L. ed. 829 (1915).

[14] See generally on this subject Beale, "Jurisdiction to Tax," 32 *Harvard Law Review,* 587, at 600; Goodrich, CONFLICT OF LAWS, Sects. 48, 61. See *contra,* Carpenter, *op. cit.,* 918.

[15] 188 U. S. 189, 23 S. Ct. 277, 47 L. ed. 439 (1902).

[16] *Supra,* note 12.

[17] 280 U. S. 204, 50 S. Ct. 98, 74 L. ed. 371, 65 A. L. R. 1000 (1930).

overrules that one and then announces principles that easily apply equally to the matter of garnishment: "In this court the presently approved doctrine is that no state may tax anything not within her jurisdiction without violating the 14th Amendment. . . Also no state can tax the testamentary transfer of property wholly beyond her power. . . These principles became definitely settled subsequent to *Blackstone* v. *Miller,* and are out of harmony with the reasoning advanced to support the conclusion there announced. . . *Blackstone* v. *Miller* no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled." Again, quoting from *Cleveland, P. & A. R. Co.* v. *Pennsylvania* (*State Tax on Foreign-held Bonds*) the court proceeds:[18] " 'Debts owing by corporations, like debts owing by individuals, are not property of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due.' "

This case has been followed by three subsequent ones which have applied the rule that a succession tax cannot be levied on a debt in the state of the debtor to bank deposits and corporate stock.[19]

The express overruling of *Blackstone* v. *Miller* and the reasons given by the court in these four cases offer to the court an opportunity to repudiate the doctrine of *Harris* v. *Balk;* and there is a distinct possibility that when the matter is directly presented to the court it will adopt a more logical theory.

It is clear, however, that the court is not definitely committed to such course, and it is easy to discover arguments that the decisions on jurisdiction for taxation should not control the matter of jurisdiction for garnishment.

In the first place, although the decision of *Farmers' Loan & Trust Company* v. *Minnesota*[20] is based upon the tenet that the state of the debtor's domicile does not have jurisdiction to levy the tax (as indicated by the quotations above), it nevertheless goes further and suggests the broader holding that double taxation is violative of the due process clause of the Fourteenth Amendment.[21] The three subsequent cases render this suggestion actual law; the last of the three,[22] as a matter of fact, announces first that there can be no double taxation and then decides which of the two states will be allowed to impose the tax. It can be argued, therefore, that the Minnesota case was based upon the unconstitutionality of double taxation, which obviously does not affect garnishment.

Again, courts have long distinguished between jurisdiction to tax and jurisdiction for garnishment proceedings in the case of tangible property. It is well

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[18] 15 Wall. 300, 21 L. ed. 179 (1877).

[19] *Baldwin* v. *Missouri,* 281 U. S. 586, 50 S. Ct. 436, 74 L. ed. 1056, 72 A. L. R. 1303 (1930); *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1, 51 S. Ct. 54, 75 L. ed. 131 (1930); *First National Bank of Boston* v. *Maine,* 284 U. S. 312, 52 S. Ct. 174, 76 L. ed. 313, 77 A. L. R. 1401 (1931).

[20] *Supra,* note 18.

[21] "We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for by Minnesota."

[22] *First National Bank of Boston* v. *Maine, supra,* note 19.

settled that tangible property may be attached in any state where it lies;[23] and the holder may be garnished in the state where he holds the property. Nor does it make any difference that the property is only temporarily within the state.[24] On the other hand, property only temporarily within a state is not subject to taxation: it must acquire a situs.[25] It is possible that the same distinction might be applied to intangible property. In the case of intangible property, however, there is no situs and the ground for the distinction is really not present.

Once again, as explained above, the devision of *Harris* v. *Balk*[26] is based not so much upon the theory that the debt acquires a situs wherever the debtor is found, as upon the theory that the principal creditor represents the principal debtor in bringing the garnishment proceedings. If this view be followed strictly, the recent decisions of the Supreme Court can have no effect whatever upon the matter of garnishment because there is then no question of jurisdiction. The decision of *Harris* v. *Balk* was not based solely upon this view, however; and it is rather doubtful if the court would continue to follow the case if the other reasons for so holding were taken away.

From these and other arguments that might be advanced why the succession-tax cases should not affect the decision in *Harris* v. *Balk* it is evident that it is impossible to predict that that decision will be overruled. The Mississippi Supreme Court has once reversed itself in order to follow the decision of the Supreme Court of the United States. In the present uncertainty of what the latter court will hold on the matter, it is submitted that the Mississippi Court was correct in the instance case[27] in not considering itself justified in reverting to its first line of holding, until there has been an actual declaration by the Supreme Court of the United States of its present view.

John W. Wade.

Contracts—Forbearance to Sue—Release of a Doubtful Claim as Consideration for a Promise to Pay a Sum of Money.

A and B were beneficiaries under a will of their father's. The testator bequeathed a larger sum of money to B than to A. Upon ascertaining this fact, A declared his intention to contest the will, saying that he did not believe that to be his father's will. Whereupon, B promised that in consideration that A forbear to contest the will, that the money bequeathed should be divided equally. HELD: That the forbearance to contest the will was a sufficient consideration to support the contract. *Stanley* v. *Sumrall,* — Miss. —, 147 So. 786 (1933).

The court adopts the rule as advanced by the American Law Institute to the effect that any consideration that is not a promise is sufficient to support a promise, except the following: "(b) The surrender of, or forbearance to assert an invalid claim or defense by one who has not an honest and reasonable belief in

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[23] *Downer* v. *Shaw,* 22 N. H. 277 (1851); *Bowen* v. *Pope,* 125 Ill. 28, 17 N. E. 64 (1888).

[24] Carpenter, *op. cit.,* 31 *Harvard Law Review,* at 909.

[25] *Hays* v. *Pacific Mail Steamship Co.,* 17 How. 596, 15 L. ed. 254 (1854); *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150 (1905); *Bain* v. *Richmond & D. R. Co.,* 105 N. C. 363, 11 S. E. 312, 18 Am. St. Rep. 912, 8 L. R. A. 299 (1890).

[26] *Supra,* note 6.

[27] *Bean* v. *Bean et al., supra.*

its possible validity."[1] The court continues: "Forbearance to assert a claim which might reasonably be doubtful is sufficient consideraton to support a promise." A doubtful claim is held to be "one honestly and in good faith asserted, arising from a state of facts on which a cause of action can be predicated, with a reasonable belief on the part of the party asserting it that he had a fair chance of sustaining his claim, and concerning which an honest controversy may arise, although, in fact, the claim may be wholly unfounded."[2]

The question presented is whether or not the release of a claim asserted is sufficient consideration to support a promise to pay a sum or perform an act in settlement thereof.

Forbearance to assert a valid claim or right is sufficient under all the authorities to support a promise.[3]

Also, if the claim is void because based upon an illegal (as distinguished from insufficient) consideration, a forbearance to press the claim by suit is not a valid consideration for a new promise.[4] Under all the authorities the release of a claim known to be frivolous and vexatious or without foundation is not a good consideration for a promise in settlement thereof. Good faith is a necessary prerequisite, for otherwise the courts would be forced to give their sanction to fraud.

There is an isolated rule requiring the claim released to be of such a nature as would ultimately have been decided in favor of the claimant. This doctrine is supported by some of the early English decisions.[5] The doctrine, however, no longer finds sanction in the English Courts.[6] The rule was apparently adopted by some of the early American decisions.[7] The doctrine is manifestly unsound and deserves no further comment.

There are, in general, three lines of authority holding an invalid claim consideration sufficient to support a promise in settlement thereof. They are as follows:

First: That forbearance to sue constitutes or may be found to constitute a good consideration for a promise, and it is not necessary that it should appear that there was in fact a good cause of action or a fair and reasonable ground of success in the threatened suit, but only that the claim is not known to be frivolous or vexatious, so as to be fraudulent or wanting in good faith.[8] The reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession.[9] A doubtful, colorable, or even plausible claim may be a good basis for a suit, where forbearance to press it is had, and a suit is brought on the forbearance.[10] It is not every dispute which will form the basis of a promise to pay or settle. A mere controversey between the parties is not sufficient; but "it is not necessary that the matter in dispute

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[1] The American Law Institute, RESTATEMENT, CONTRACTS, Section 76 (b).
[2] Citing: *Sharp* v. *Bowie,* 142 Cal. 462, 76 Pac. 62 (1903).
[3] *Fetterman* v. *Badger Lumber & Mfg., Co.,* 162 Miss. 547, 139 So. 406 (1932).
[4] *Union Collection Co.* v. *Buckman,* 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568 (1907). See also, *Lindsey* v. *Sellers,* 26 Miss. 169 (1853).
[5] *Wade* v. *Simeon,* 2 C. B. 548 (1846).
[6] *Cook* v. *Wright,* 1 Best. & S. 559 (1861).
[7] *Gould* v. *Armstrong,* 2 N. Y. Super. Ct. (2 Hall), 266 (1829).
[8] *Mackin* v. *Dwyer,* 205 Mass. 472, 91 N. E. 893 (1910). *Codman* v. *Dumaine,* 249 Mass. 451, 144 N. E. 408 (1924). *Rue* v. *Meirs,* 43 N. J. Eq. 377, 12 Atl. 369 (1888). *Miles* v. *New Zealand Alford Estate Co.,* 32 Ch. D. 266 (1886).
[9] *Blout* v. *Wheeler,* 199 Mass. 330, 85 N. E. 477, 17 L. R. A. (N. S.) 1036 (1908).
[10] *Wiener* v. *Kendler,* 197 N. Y. S. 585 (1922).

should be really doubtful in fact, provided the parties to the controversy *bona fide* consider it so."[11]

Second: That the forbearance to assert an invalid claim or defense is a good consideration to support a promise to pay a sum in settlement thereof only where the parties entertain an honest and a reasonable belief in the possible validity of the claim asserted. There is abundant authority in support of this view.[12] There is, in actual practice, little difference in the effect of the two above rules. It is difficult to convince the court of good faith where the claim was wholly unreasonable. Very few cases upholding the former rule were decided where there were not some reasonable grounds for belief between the parties.[13]

Third: That a release of a doubtful claim is a sufficient consideration to support a promise in settlement thereof, a doubtful claim being interpreted as a claim which commends itself to the court as being of doubtful outcome if pursued to final determination. The fault to be found in this view is that it virtually requires all who have a claim to possess the erudition of a learned court of justice in order that he may successfully settle his claim out of court. "If the compromise of the parties is made to depend on the question whether the parties have so settled the dispute as the law would have done, then it may be truly said that a compromise is an unavailing ideal act which questions even the power of the parties to bind themselves."[14] "The law favors the avoidance or settlement of litigation and compromises in good faith for such purpose will be sustained as based upon a sufficient consideration, without regard to the merits of the controversy or the character or validity of the claim of the parties, and even though a subsequent judicial decision may show the rights of the parties to have been different from what they at the time supposed."[15] The doctrine has a tendency to restrict the freedom of compromise unnecessarily, and is, therefore, justly abandoned. The earlier Mississippi decisions,[16] though not expressly, by reasonable inference, adopt this view. Thus, in *Foster* v. *Metts, supra,* the plaintiff suffered a loss of his property through the misconduct of the defendant mail contractor's subordinate. The plaintiff asserted a claim against the mail contractor and threatened suit. In consideration of the plaintiff's forbearance to bring suit upon the alleged claim, the defendant executed to the plaintiff a promissory note in settlement thereof. The court held that as a clear matter of law, aside from the merits of the claim, a mail contractor was not liable for the misconduct of his subordinates to the owner of property being carried by him. Campbell, J., delivered the opinion of the court: "The compromise of doubtful rights is a sufficient consideration for a promise to pay money, but compromise implies mutual concession. Here there was none on the part of the payee of the note. His forbearance to sue for what he could not recover at law or in equity was not sufficient consideration for the note." There was no suggestion in this case that the plaintiff did not have an honest and *bona fide* belief in the claim which he asserted. It is more than probable that any layman, being placed in similar circumstances, would

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[11] *Demars* v. *Musser-Sauntry Land, Logging & Mfg. Co.,* 37 Minn. 418, 35 N. W. 1 (1887).

[12] See RESTATEMENT, CONTRACTS, *supra. Frank S. Heath* v. *Portlatch Lumber Co.,* 8 Idaho 42, 108 Pac. 343, 27 L. R. A. (N. S.) 707 (1910).

[13] See explanatory note, section 76, RESTATEMENT, CONTRACTS.

[14] *Heath* v. *Potlatch Lumber Co.,* 18 Idaho 42, 108 Pac. 343, 27 L. R. A. (N. S.) 707 (1910).

[15] *McGlynn* v. *Scott,* 4 N. D. 18, 59 N. W. 460 (1894).

[16] *Foster* v. *Metts,* 55 Miss. 77 (1877). *Gunning* v. *Royal,* 59 Miss. 45 (1881). *Boon* v. *Boon,* 58 Miss. 820 (1881).

have asserted a similar claim. As between the parties to the controversy the claim was reasonably doubtful. In *Newell* v. *Fisher, supra,* the court held that "in order to render the agreement to forbear, and forbearance of a claim a sufficient consideration, it is essential that such claim be sustainable at law; the consideration fails if it appear that the demand was utterly without foundation." Under this decision the claim must have been "sustainable," and this regardless of how honestly it might have been asserted or how reasonable it might have been as between the parties.

In the instant case (*Stanley* v. *Sumrall, supra*) it was evidently the intent of the court to bring the case within the rule advanced by the RESTATEMENT OF THE LAW OF CONTRACTS. But the court in defining a "doubtful claim" is rather confusing. The phrase "arising from a state of facts on which a cause of action can be predicated," and the subsequent statement that "the claim may be wholly unfounded" are in palpable contradiction. The use of the former phrase has a tendency to revert to the earlier Mississippi decisions requiring that the claim forborne be "sustainable at law." It is clear that a claim "arising from a state of facts on which a cause of action can be predicated" is not one which is "wholly unfounded." In order to bring the phrase within the spirit of the rule and in harmony with the remaining part of the definition, it should have been stated in words to the effect that it must have been a claim "arising from a state of facts on which the parties may reasonably believe that a cause of action could be predicated."

The foundation for the diverse decisions upon the present question is found in the various constructions placed upon consideration. It is elementary that a consideration may consist of either a benefit to the promisor or a detriment to the promisee. It is often difficult, however, to find a substantial benefit or detriment. Some of the cases have gone so far as to disregard the question of consideration in the form of benefit and detriment and uphold the promise upon the grounds of what has come to be known as "promissory estoppel."[17] According to this theory the mere promise, without more, would carry with it the presumption of detriment to the promisee, and consequently the promisor would be "estopped" to deny the consideration. Of course where fraud makes its appearance, as in the case where a claim is asserted with knowledge upon the part of the claimant that his claim is wholly unfounded but is asserted merely for the purpose of extortion, there would be no ground for the application of the equitable doctrine of estoppel. This view signifies the current trend of legal thought, but few courts have as yet directly applied the theory. The spirit of the doctrine, however, may be recognized in the rule advanced by the American Law Institute in its RESTATEMENT OF THE LAW OF CONTRACTS:"[18] that "a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." It has been held that "the mere privilege of filing a complaint is not a right that can be properly called either a legal or equitable

[17] See *Allegheny College* v. *Nat. Chautauqua County Bk. of Jamestown,* 246 N. Y. 369, 159 N. E. 173 (1927), in which Cardozo, C. J., delivered the opinion and used the following language: "There has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled 'a promissory estoppel.'" And, "the classic form of statement identifies consideration with detriment to the promisee sustained by virtue of the promise."

[18] RESTATEMENT, CONTRACTS, section 90

right;"[19] and consequently, the forbearance to bring a complaint which is invalid can be no consideration for a promise in settlement thereof. This view is decidedly in the minority. The better rule of the two is that "the surrender of any power that one is privileged to exercise is a sufficient consideration, and so also is the forbearance to exercise such power."[20]

VARDAMAN S. DUNN.

EMBLEMENTS—UNGATHERED PECANS AS PERSONAL PROPERTY—TENANT'S RIGHT TO CROPS AS AGAINST LESSOR'S MORTGAGEE.

Six days before commencement of foreclosure proceedings under a mortgage and deed of trust the chancery court, on behalf of the mortgagee, granted an injunction restraining mortgagor's tenant by unexpired lease from further gathering of ripe pecans, on the ground that the impending foreclosure vested in the mortgagee an equitable right to the ungathered pecans. HELD: Injunction dissolved. *Wood* v. *Pace et al.*, 164 Miss. 187, 143 So. 471 (1932).

In dissolving the injunction, the Supreme Court of Mississippi held that Section 3468 of the MISSISSIPPI CODE OF 1930 governed the case (" . . . in case of foreclosure of deeds of trust . . . the mortgagor shall be entitled to cultivate and gather the crops, if any, planted by him and grown or growing on the premises at the time of the commencement of the suit; . . . "), the tenant being subrogated to the rights of his lessor, the mortgagor. In interpreting a similar statute of Georgia,[1] *Virginia-Carolina Chemical Co.* v. *Floyd*[2] reached the same conclusion.

The opinion in the instant case, after holding that the case is within the terms of the statute, further lays down rules to the effect that there is a difference beween nuts grown in a state of nature without cultivation, labor, or fertilizer, and those grown by cultivation, industry, and fertilizers by man; and that the ownership of nuts should be determined by their maturity or readiness for gathering, rather than by the fact that they were actually upon the trees at the time of the suing out of the injunction. Although these latter rules are unnecessary for the determination of this present suit, they should be useful in the determination of future controversies between landlord and tenant in regard to unharvested crops, as the Mississippi statute applies only to forfeitures under contracts of purchase and foreclosures of deeds in trust.

In ruling that the facts of labor, industry, fertilization, and cultivation should be considered as determinative of the question whether crops grown on perennial trees were *fructus industriales* ("emblements"[3]), the Mississippi court definitely departed from the common law[4] and aligned itself with the modern doctrine, as laid down in 17 CORPUS JURIS 380: "The correct test to apply is to ascertain whether the annual fruit is produced by the annual labor of man, such as necessary manurance or other industry."[5] A holding in accord with this test will give to the producer of the crops the benefit of his labors. This test seems to

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[19] *Nicholson* v. *Neary*, 77 Wash. 294, 137 Pac. 492 (1914).
[20] *Schade* v. *Muller*, 75 Ore. 225, 146 Pac. 144 (1915).

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[1] GEORGIA LAWS 1922, page 114: " . . . all crops, matured or unmatured, are declared to be personalty; . . . "
[2] *Virginia-Carolina Chemical Co.* v. *Floyd*, 159 Ga. 311, 125 S. E. 709 (1924).
[3] 17 CORPUS JURIS 380.
[4] *Waddington* v. *Bristow*, 2 B. & P. 452, 126 Reprint 1379. *Rodwell* v. *Phillips*, 9 M. & W. 501, 152 Reprint 212.
[5] 17 CORPUS JURIS 380.

be based upon sound reasoning; for, although the perennial trees would not die without human cultivation, they would certainly not bear the crop that they would if plied with cultivation and fertilization.[6] The crop from the perennial tree requires periodical expense, industry, and attention in its yield.[7]

The pecan tree furnishes a particularly vivid illustration of the fruits of trees as *fructus industriales,* because, although it is a native Mississippi tree, in its wild state its nuts are small both in size and number; but, when it is cultivated, fertilized, and cared for yearly, the crop is many times larger; and, when the trees are grafted, the nuts are several times larger than the wild nuts. It is a well-known fact among pecan growers that lapse of cultivation and fertilization decreases the size and quality of the crop by a large percentage.

In regard to the question as to the factual condition at which crops become personalty, Mississippi, by laying down the rule that if the nuts are mature or ready for gathering, they belong to the tenant, definitely adopts what is known as the "maturity test."[8] This "maturity test" classifies a crop still standing on the soil, or still attached to the trees, as personalty, if the crop is ripe or mature, because the crop no longer draws sustenance from the soil, which acts as a mere warehouse or storage space for the crop ready for harvest.[9] This "maturity test" is not used by all states; some states adopt the "severance test," which requires, in order for the crop to be classed as personalty, that there be an actual severance from the soil, or harvest.[10] That crops severed from the soil are personalty is an universal rule, with little or no conflict among the authorities.[11]

Although *fructus industriales* and *fructus naturales* both become personalty upon severance from the soil, the "severance test" and the "maturity test" will conflict when it must be determined whether or not unsevered mature crops are personalty. In such a case, the crops, by the "maturity test," would be personalty, although under the "severance test" they would be a part of the realty until harvest.

Ebb J. Ford, Jr.

Evidence—Presumption Against Suicide—Burden of Proof in Action on Double Indemnity Policy of Insurance.

The plaintiff, widow of the deceased insured, brought action to recover upon a policy of life insurance issued by the defendant company, which policy provided for double indemnity in the event of accidental death. Further provision was made that, in the case of self destruction within two years from the date of the issuance of the policy, the recovery should be limited to the amount

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[6] *Vulicevich* v. *Skinner,* 77 Cal. 239, 19 Pac. 424 (1888). *Summerlin* v. *Orange Shores, Inc.,* 122 So. 508.

[7] 8 Ruling Case Law 357.

[8] *Richards* v. *Knight,* 78 Iowa 69, 42 N. W. 584 (1889). *Hecht* v. *Dittman,* 56 Iowa 679, 7 N. W. 495 (1880). *First National Bank of Clay Center* v. *Beegle,* 52 Kan. 709, 35 Pac. 814 (1894). *Tittle* v. *Kennedy et al.,* 71 S. C. 1, 50 S. E. 544 (1905). 8 Ruling Case Law 361.

[9] *Hecht* v. *Dittman,* 56 Iowa 679, 7 N. W. 495 (1880). *Simpson* v. *Ferguson,* 112 Cal. 180, 44 Pac. 484 (1896). *Myers* v. *Steele et al.,* 98 Kan. 577, 158 Pac. 660 (1916). *First National Bank of Clay Center* v. *Beegle,* 52 Kan. 709, 35 Pac. 814 (1894).

[10] *Tripp* v. *Hasceig,* 20 Mich. 254, 4 Am. Rep. 388 (1870). *In re Andersen,* 83 Neb. 8, 118 N. W. 1108 (1908). *Heavilon* v. *Heavilon,* 29 Ind. 509 (1868).

[11] 8 Ruling Case Law 357. *Hartshorne* v. *Ingels,* 23 Okla. 535, 101 Pac. 1045 (1909).

of premiums paid. Approximately twenty months after issuance, the insured was killed by train in the city of Laurel. It was the contention of the plaintiff that the death was accidental, while the defendant contended that it was suicidal. The lower court instructed the jury that the burden was upon the defendant to prove suicide since suicide created an exception to the duty to pay. The lower court further instructed the jury that the burden of proving accidental death was upon the plaintiff. The defendant contended that the burden of proof as to suicide was upon it as to the face of the policy, namely $1,000; but as to the $1,000 claimed under the double liability clause, the burden was on the plaintiff to show accidental death. HELD: (1) There is a presumption that the deceased did not commit suicide, (2) but such presumption is rebuttable, and where different inferences might be drawn from the facts, question of suicide should go to the jury. (3) Peremptory instruction should not be granted if presumption against suicide is controverted either by direct evidence or inference from evidence. (4) Burden is on the defendant to prove suicide as to the face value of the policy, namely $1,000; (5) but as to the $1,000 claimed under the double liability clause, burden is on the plaintiff to prove accidental death. *Jefferson Standard Life Insurance Co.* v. *Jeffcoats,* 164 Miss. 659, 143 So. 84. (1932).

Firmly embedded in our system of jurisprudence is the presumption against suicide.[1] It is founded on two principles: First, it is said that man's natural instinct is to avoid injury and to preserve life, and consequently it is highly improbable that anyone of sound mind would terminate his own life.[2] In fact, such a conclusion would run contrary to the very fundamental principle of self-preservation. Secondly, it is said that no one is ever presumed to have committed a crime; and since at common law suicide was a felony and at present day an act involving moral turpitude, the quite natural presumption arises that the deceased did not bring about his own death.[3] In Mississippi, it is a violation of law to encourage or assist one in his wilful self destruction;[4] and it follows that in this state suicidal death is at least regarded as an act of moral wrong.

There can be no question that the presumption exists. Presumptions, however, are often classified; and the most frequent classification divides them into presumptions of law and presumptions of fact. At this point, it becomes pertinent to briefly consider this classification and its relation to the presumption presently considered. Professor Wigmore contends that the division of presumptions into presumptions of law and those of fact is entirely fallacious; he explains that the distinction between them is in final analysis the difference between things that are presumptions and those which are not.[5] A presumption is a rule of law attach-

[1] 2 Jones, COMMENTARIES ON EVIDENCE, 2nd Ed., sec. 254; *Grand Lodge* v. *Bannister,* 96 S. W. 472, 80 Ark. 190; *Van Norman* v. *Modern Brotherhood,* 121 N. W. 1080, 143 Iowa 536;*Lamb* v. *Union Ry. Co.,* 88 N. E. 371, 195 N. Y. 260; *Vicars* v. *Aetna Life Ins. Co.,* 164 S. W. 106, 158 Ky. 1; *Green* v. *New York Life Ins. Co.,* 182 N. W. 808, 192 Iowa 32; *Wharton* v. *New York Life Ins. Co.,* 100 S. E. 266, 178 N. C. 135; *Mass. Protective Assn.* v. *Cranford,* 102 So. 171, 137 Miss. 876.

[2] *Bear* v. *Sov. Camp W. O. W.,* 207 Mo. App. 484, 226 S. W. 299; *E. E. Walsh Teaming Co.* v. *Industrial Commission,* 125 N. E. 331, 290 Ill. 536; *Jenkins* v. *Hawkeye Commercial Men's Assn.,* 124 N. W. 199, 147 Iowa 113.

[3] *Almond* v. *Modern Woodmen of America,* 130 Mo. App. 382, 113 S. W. 695: See *Sov. Camp W. O. W.* v. *Dennis,* 17 Ala. App., 642, 87 So. 616, at page 619: "At common law suicide was a felony, and in Alabama is a crime involving moral turpitude. The presumption is that a person is innocent of crime until his guilt is established beyond a reasonable doubt."

[4] MISSISSIPPI CODE, 1930, sec. 1138.

[5] Wigmore, EVIDENCE, 2nd Ed., sec. 2491.

ing to a certain fact or facts a precedural consequence which is used for the purpose of shifting the burden of producing evidence. It is not the fact itself nor the legal inference drawn from the fact, but the rule of law securing the procedural consequence.[6] On the other hand, the term "presumption of fact" is merely a substituted expression for the evidentiary value and potency of a fact; it is the inference furnished by a fact, which inference is not regarded as sufficiently grounded in reason to be given the procedural effect of shifting the burden of going forward with the evidence.

Considering now the presumption against suicide, is that presumption one of law or one of fact? Or as might be differently expressed, is such a presumption one as in truth may be called a presumption or is it merely a legal inference which the jury may draw from the fact of death? There is authority for the proposition that it is only a presumption of fact, for in the case of *Modern Woodmen of America* v. *Craiger*,[7] the court says: "The matter in controversy here was a private contract not involving directly public policy or welfare, and there was not [*sic*] legal presumption pertinent or available to either party. It is true that death by suicide is unnatural, and it is not inaccurate to say negatively that the law will not presume an unexplained death to have been suicidal, as it will not presume the existence of fraud, bad faith, or dishonest conduct. In determining the charge of suicide, the jury may properly consider the facts and circumstances bearing upon that question given in evidence in the light of their common knowledge and experience that mankind instinctively loves life and generally shuns death, although men occasionally both sane and insane, take their own lives. The cause of death was directly in issue in this case to be decided not by a presumption of law but as an inference of fact in the same manner as other facts are determined in civil actions." However, the fact remains that by the holdings of practically all of the courts, the presumption is one of law. In legal effect, this presumption has the necessary power and legal potency to shift upon the opposing party the duty of producing evidence.[8] Where the burden of proof is upon the plaintiff, the presumption against suicide, by virtue of its effect under the law, creates a *prima facie* case which places upon the defendant the duty of producing evidence or else standing defeated in the cause.

The court in the instant case further announces that the presumption is not conclusive, and there can be no question that the announcement is correct. In fact, it is submitted that no presumption is conclusive; for, if from the existence of a certain fact or facts, a certain fact is conclusively presumed, the presumption ceases to act in its true capacity as a procedural implement and instead acts as and is a rule of substantive law.[9] For illustration, let us consider one of the so-called conclusive presumptions. It is said that a conclusive presumption exists that a child under seven years of age cannot comit crime.[10] When such a presumption is injected into a case, it is evident that it serves no procedural purpose.

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[6] 5 Wigmore, Evidence, 2nd Ed., sec. 2491.

[7] 92 N. E. 113, 174 Ind. 381.

[8] *Mass. Protective Assn.* v. *Cranford,* 137 Miss. 876, 102 So. 171; *Vicars* v. *Aetna Life Ins. Co.,* 164 S. W. 106, 158 Ky. 1; *Pagel* v. *U. S. Casualty Co.,* 148 N. W. 878, 158 Wis. 278. See *Griffith* v. *Continental Casualty Co.,* 253 S. W. 1043 299 Mo. 426, at page 1048: "The presumption against suicide is a rebuttable legal presumption. In its character as a presumption it is not evidence; it is a mere rule of law which operates to throw upon the party against whom it is raised the duty of going forward with the evidence. It performs no other function and has no other significance."

[9] Wigmore, Evidence, 2nd Ed., sec. 2492.

[10] 2 Jones Commentaries on Evidence, 2nd Ed., sec., 341, at page 575.

It is not used to place upon the opposing party a duty of going forward with the evidence. Being a matter not procedural, it is in actuality not a part of the law of evidence. Rather, a rule of substantive law comes into existence which says: no child under seven years of age can commit a crime. It is as much a part of the substantive law as is the rule that mutual promises are good consideration in the formation of a contract. Wigmore says: "Wherever from one fact another is conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule really provides that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence." From the idea that no presumption is conclusive, it is logical to conclude that all true presumptions are rebuttable.[11]

Further, we find the court announcing that a peremptory instruction should not be granted if the presumption against suicide is controverted either by direct evidence or any inference from the evidence. Certainly that announcement is in consistency with fundamental legal principles. Under our system of jurisprudence in the circuit courts, the province of the judge is to determine the law; the province of the jury is to determine the facts. It would be an invasion of the functions of the jury for the judge to determine an ultimate fact when from the evidence or inference from the evidence different conclusions as to that ultimate fact might be reached.[12]

As previously remarked, a presumption is a procedural matter. But, at this point it should be noted that its procedural efficacy is not for the purpose of shifting the burden of proof. True, it shifts the burden of going forward with the evidence; but that is an entirely different matter from the burden of proof. The burden of proof is stationary; and once it is established upon a party in controversy, it remains with him throughout the trial of his case.[13]

We now consider the question of the burden of proof. In the instant case, the Mississippi Supreme Court holds that in determining the question of liability as to the original face value of the policy, namely, $1,000, the burden of proof is on the defendant insurance company to establish suicide; in seeking to establish liability under the double indemnity clause for an additional $1,000, the burden of proof is upon the plaintiff to prove accidental death. A question presents itself. Why divide the burden of proof in such a manner? At the outset, it should be noted that in effect the policy in question might be regarded as two policies: an ordinary policy of life insurance for $1,000 and an accidental policy for $1,000. So separating the parts of the policy, we are better able to see the reason for the division of the burden of proof. In the ordinary life policy, the insurer primarily promises to pay on the death of the insured. In asserting suicide to defeat the duty to pay, the insurer is bringing forth an exception to the duty to pay; it is alleging affirmative facts in its effort to come within the

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[11] 22 CORPUS JURIS 82.

[12] *Cox* v. *Royal Tribe,* 42 Ore. 365, 71 Pac. 73; *Nichols* v. *Commercial Travellers Eastern Accident Assn.,* 221 Mass. 540, 109 N. E. 449; *South Atlantic Life Ins. Co.* v. *Hunt,* 115 Va. 398, 79 S. E. 401. See *Eminent Household* v. *Matlock,* 144 Ark. 126, 221 S. W. 858 at 860: "While it must be confessed that the theory of suicide does appear more probable than any other theory, the question of probabilities is one addressed to the jury, and not to us."

[13] *First Nat. Bank* v. *Ford,* 30 Wyo. 110, 216 Pac. 691; 1 Jones. COMMENTARIES ON EVIDENCE, 2nd Ed., sec. 31; 5 WIGMORE, EVIDENCE, 2nd Ed., sec. 2489.

exception. Therefore, generally, in the ordinary policy of life insurance, the burden of proof is on the insurer to establish the suicide which it affirmatively brings forth.[14]

The accident policy is different. The insurer does not primarily promise to pay on the death of the insured. Instead, the insurer says: "I will pay only in the event of accidental death." Accidental death is accordingly a condition precedent to the insurer's liability.[15] In a suit on any contract, the party suing must prove the fulfillment of all conditions precedent to the defendant's liability. Accordingly, and in consistency with the principle aforementioned, the beneficiary in a suit on an accident policy must prove the accidental death.[16]

It is submitted that the instant decision is pre-eminently correct and supported both in reason and by authority.

SIDNEY MAY.

MASTER AND SERVANT—LIABILITY OF MASTER FOR PROHIBITED ACTS OF SERVANT.

The defendant had instructed her chauffeur not to let her son drive her automobile unless she were in the car, but he let the son drive when the defendant told the chauffeur to take the son to town. As a consquence of the son's negligent driving, the plaintiff was injured. HELD: the injury was due to the act of the servant; and the act of the servant was the act of the master; and the master was not relieved of liability even though she had instructed her chauffeur not to let her son drive the car. *Slaughter* v. *Holsomback,* 165 Miss. 161, 147 So. 318.

This case does not involve the doctrine of parent and child; and the family automobile doctrine does not apply in this case, for this doctrine has been abrogated in Mississippi.[1]

In its opinion the court appears to be inconsistent in its reasoning. At one place it asserts that: "The master is not relieved of negligence assignable to driver where the chauffeur permitted incompetent driver to drive, and remained

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[14] WIGMORE, EVIDENCE, 2nd Ed., sec. 2510; 2 Jones, COMMENTARIES ON EVIDENCE, 2nd Ed., secs. 565. In *Travelers' Ins. Co.* v. *Harris* (Texas) 212 S. W. 933, (1919), a case in which action is brought on an accident insurance policy, the court says: "Those courts which treat the contracts as being general, and the clauses declaring what they shall not cover as 'stipulations added to the principal contract to avoid the promise of the insurer by way of defeasance or excuse,' hold that these clauses are defensive and must be pleaded and sustained by the insurer; while the courts which construe the exception clauses as 'taking something out of the general portion of the contract, so that the promise is to perform only what remains after the part excepted is taken away,' place the burden of pleading and proof upon the assured to negative them by showing his cause of action does not come within the exception. . . . We are of opinion that the burden rests upon the plaintiff to show that her cause of action does not fall within the excepting clause." It would seem from this explanation that in an action upon a life policy with exceptions, the burden of proof as to suicide would be upon the plaintiff; but in *Green* v. *Missouri State Life Ins. Co.* (1920), 219 S. W. 552, the Texas court placed the burden of proof as to suicide upon the insurer.

[15] 5 Wigmore, EVIDENCE, 2nd Ed., sec. 2510.

[16] 2 Jones, COMMENTARIES ON EVIDENCE," 2nd Ed., sec. 564, 5 Wigmore, EVIDENCE, 2nd Ed., sec. 2510; *U. S. Fidelity & Guaranty Co.* v. *Blum,* 270 Fed. 946; *Postler* v. *Travelers Ins. Co.,* 158 Pac. 1022, 173 Cal. 1; *Mass. Protective Assn.* v. *Cranford,* 102 So. 171, 137 Miss. 876.

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[1] *Smith* v. *Dauber,* 155 Miss. 694, 125 So. 102; *Hobson* v. *McLeod,* 165 Miss. 853, 147 So. 778.

in the automobile with general power of supervision." Later, we are told that, "We think it is clear that the jury were warranted in drawing the inference from all the evidence of Mrs. Slaughter that she knew, or should have known, or might reasonably have anticipated, that when she placed the car in the hands of a negro chauffeur younger than her son, the son would dominate the situation." These statements seem inconsistent with each other: one says that the chauffeur should control the situation if he is on the seat with the substituted driver and the other that the defendant should have known that the son would dominate the situation over the negro chauffeur.

In rendering the opinion of the court, Justice McGowen cites the case of *Grant* v. *Knepper*.[2] In this case Judge Cardozo says: "Even though the chauffeur permitted another to drive an automobile for him on the public highways of this state when he was present and consenting thereto, the master is not relieved of any negligence which is assignable to the drive if the chauffeur remained in the automobile with general power of supervision and control, where the substituted agent was incompetent by reason of want or skill or otherwise." There is a distinction in this case and in the one at bar. In the New York case, the driver had not been told not to let anyone drive the car, but the driver of a truck had let a salesman drive merely to satisfy the fancy of the salesman.

The Mississippi court says that the defendant would be liable in this case under the doctrine of *respondeat superior,* in that he who acts through another is himself the actor. The relation of master and servant had been established here, and, "Where the relation of master and servant is established, a master is liable under the doctrine of *respondeat superior* for the negligence of his servant."[3]

The general rule in this type of cases where an act has been forbidden to the servant by the master is that "a master is responsible for the wrongful acts of his servant committed in the business of the master and within the scope of his employment, even though the servant in doing the act departed from the instruction of the master."[4]

It seems that this is a harsh rule. In the case at bar, for example, the defendant had expressly forbidden her servant chauffeur to let her son drive the car, but the chauffeur had violated the instructions and let the son drive. Thus the court held the defendant liable even in the face of her express instructions. How, then, is a master to keep himself free from liability when he expressly tells a servant not to do one specific thing and the servant does that thing in direct violation of that prohibition?

The case of *Walters* v. *Stonewall Cotton Mills,*[5] is a leading case in Mississippi on this subject. The rule laid down in that case was that the fact that the servant's wrongful act in furtherance of master's business was unauthorized or contrary to instructions does not relieve the master from liability. The court in this case said: "If the servant when he committed the wrongful act, was acting in furtherance of the master's business, for which he was employed, the master is liable, although the servant in doing the act contrary to the instructions of the master, went beyond his authority."

This rule is followed in Colorado,[6] where a violation of the master's instruction

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[2] 245 N. Y. 158, 156 N. E. 650, 54 A. L. R. 845.
[3] *Woods* v. *Clements,* 113 Miss. 720, 74 So. 422, L. R. A. 1917 E, 357.
[4] *Walters* v. *Stonewall Cotton Mills,* 136 Miss. 361, 101 So. 495.
[5] 136 Miss. 361, 101 So. 495.
[6] *Ward* v. *Teller Reservoir & Irrigation Co.,* 60 Colo. 47, 153 p. 219.

alone by the chauffeur was held not to relieve the employer from liability for an injury caused by negligent driving.

A case that discusses whether or not the servant is acting in the scope of his authority is that of *Dowdell* v. *Beasley*.[7] This case holds that a mere deviation from the explicit instructions of the master, such as making a detour, does not remove a servant from the course of his employment.

Another case touching on the question discussed in the case at bar is that of *House* v. *Fry*,[8] holding that where the master's son was driving his automobile within his general scope as chauffeur for him, the defendant, notwithstanding the son's disregard of directions, would be liable for damages for his negligent collision with the plaintiff's truck.

The rule has been laid down in Louisiana that an employer is held liable for injuries as a result of his chauffeur's negligence when returning for passengers after a deviation in violation of instructions.[9]

This rule is followed in Alabama: "A master is liable for negligent acts of a servant within employment though the servant's act is contrary to instructions, or expressly forbidden."[10]

Another case of this type in another jurisdiction is that of *Wagnitz* v. *Schwartz*,[11] in which case the rule is laid down that an employer may be liable for chauffeur's acts within scope of authority notwithstanding the fact that the chauffeur was disregarding instructions.[12]

While the rule outlined above seems to be the general rule in most of the jurisdictions, there are cases reaching a different conclusion. In the case of *Fluegel* v. *Coudert*,[13] the court held that the employer was not liable for the negligence of the employee driving a motor vehicle without permission and against a command.

A Mississippi case adjudicated upon the point that the master had forbidden certain acts to his servant and the servant had done the acts nevertheless, is the case of *Planter's Package Co.* v. *Parsons*,[14] in which the court held that employee's cutting trees on plaintiff's land, in violation of instructions, did not render defendant employer liable for statutory penalty.[15]

The rule on this type of cases is laid down in the American Law Institute's RESTATEMENT OF THE LAW OF AGENCY, Section 230: "An act, although forbidden or done in a forbidden manner, may be within the scope of employment."

Another rule laid down by the RESTATEMENT OF THE LAW OF AGENCY that is applicable to the case at bar is Section 239: "A master is not liable for injuries caused by the negligence of a servant in the use of an instrumentality which is of a substantially different kind from that authorized as a means of performing the master's service, or over the use of which it is understood that the master is to have no right of control."

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[7] 205 Ala. 130, 87 So. 18.

[8] 30 Cal. App. 147, 157 p. 500.

[9] *Goldman* v. *Yellow Cab Co.*, 17 La. App. 450, 134 So. 351.

[10] *St. Louis, San Francisco R. Co.* v. *Robbins*, 219 Ala. 627, 123 So. 12.

[11] 89 Cal. App. 511, 265 p. 318.

[12] Other cases upholding this doctrine are: *Schweinhaut* v. *Flaherty*, 49 F. (2d) 533. *Warner* v. *Davis*, 10 N. J. Misc. R. 539, 159 A. 817. *Gulf C. & F. Ry. Co.* v. *Cobb* (Tex.), 45 S. W. (2d) 323. *Denny* v. *Riverbank Court Hotel Co.* (Mass.) 184 N. E. 452.

[13] 244 N. Y. 393, 155 N. E. 683.

[14] 153 Miss. 9, 120 So. 200.

[15] Other cases holding that the master is not liable when the servant does some act in violation of his commands include: *Model Laundry* v. *Collins*, 241 Ky. 191, 438 S. W. (2d) 693. *Keer* v. *Clark*, 257 N. Y. S. 869, 236 App. Div. 10.

It seems, therefore, that the term "scope of authority or employment," as used in Section 230 of the RESTATEMENT OF THE LAW OF AGENCY, should be construed in a narrow sense. Otherwise, the master will have but little, if any, protection; and it would appear that he should have some way of prohibiting his servant from doing some specific act and thus protecting himself from a violation of his instructions. Of course, it is not contended that the master should be able to relieve himself of liability by telling his servant to get a "pound of flesh and . . . . not to spill blood"; but it is submitted that the courts should be very reluctant in considering a prohibited act within the scope of authority and thus holding the master liable therefor.

BILLY BACON.

TELEPHONES AND TELEGRAPHS—LIABILITY FOR DELIVERY TO IMPOSTOR.

Plaintiff had had some correspondence with W. M. Steward, member of a brokerage firm, W. M. Steward & Co., with whom plaintiff had some business dealings. Plaintiff did not know Steward personally. Later a person in Houston, Texas, offered plaintiff, by telephone and telegraph, a bargain in stock of X Oil Co., Houston. Steward had been in Texas some time before this and had had some dealings with this oil company of which plaintiff knew. In accordance with these communications, plaintiff delivered to defendant some money to be transmitted to "W. M. Steward, c/o X Oil Co.," Houston, under a vigilant contract requiring positive identification of sendee before delivery to him. Defendant delivered money to person claiming to be the intended recipient, and identified as being "W. M. Steward" by person whom the operator only casually knew, and by a banker witnessing the signature by him as "W. M. Steward." On the trial the defendant contended that it delivered the money to the man with whom the plaintiff had been in telephone communication and to whom the plaintiff intended the money to be delivered. The lower court refused to instruct the jury on this issue, and instead instructed the jury on the single issue of whether or not the defendant, in fact, delivered the money to W. M. Steward which the jury found in the negative; judgment for the plaintiff. HELD: Judgment affirmed. The fact that one, sending money through a telegraph company to a person whom he had never seen, under a contract requiring positive identification, had been imposed on by a person communicating with him is no defense to the telegraph company where payment was not made to the person named in the contract. *Western Union Tel. Co.* v. *Goodman,* — Miss. —, 146 So. 128 (1933).

In deciding this case, the court remarks that this is a case of first impression as to this particular point in Mississippi. The court applied the common law rule of abolute liability as to common carriers, thus making the defendant company an insurer, citing 2 Hutchinson, CARRIERS, 739: "The law exacts of him [the carrier] absolute certainty that the person to whom delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned however justifiable the delivery may seem to have been or however satisfactory the circumstances or proof of identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned."[1]

As a decision on the liabilities of the common carrier, this decision seems to

[1] See also, 1 Moore, CARRIERS, 233-236, Sec. 21.

be in line with the weight of authority.[2] A case directly in line is *American Express Co.* v. *Smith*,[3] which followed the general rule placing liability on the common carrier for a misdelivery to an impostor of goods placed in the hands of the carrier for shipment and held the carrier liable to the consignor for delivering goods to a person who wrongfully ordered them in the name of another, the goods being consigned to the person in whose name they were ordered. However, the Federal cases have placed a limitation on this rule. In *Fulton Bag & Cotton Mills Co.* v. *Hudson Navigation Co.*,[4] it was held that when one or more persons of the same name order goods and on their being shipped the carrier delivers them to the persons ordering them after making due inquiry, the carrier is not liable though the shipper may have supposed that the order was from the other of the two persons and intended the goods to be delivered to him.[5]

In passing, it is well to notice that the instant decision did not involve a special contract limiting liability, nor was the question of the applicability of interstate commerce regulations raised.

This decision differs from the general line of authorities of this country in one important respect—in holding telephone and telegraph companies to the strict common law liability of common carriers, regardless of the line of business in which they are engaged. However, the Mississippi Court was not free to consider this point strictly on principle because of Section 196 of the Mississippi Constitution, which provides: "Express, telegraph, telephone, and sleeping-car companies are declared common carriers in their respective lines of business, and subject to liability as such." With the exception of Oklahoma and South Dakota which have statutes imposing such liability, none of the states have any such statutory or constitutional provision. However, on principle, some of the states hold telegraph and telephone companies liable as common carriers in some particulars as carrying News,[6] or a telephone company doing a general telephone business.[7] But in none of these states are such companies held to the strict liability of common carriers in every line of business in which they are engaged.

There are early decisions holding that telegraph companies are subject to the carrier's liability under the common law. But this view has generally been repudiated; and it is now generally held in this country that telegraph companies are not common carriers nor liable as such, but are liable only for failure to exercise due care. The ground for this principle is that although telegraph companies, like common carriers, are in the exercise of a public calling and consequently under obligation to serve all who choose to employ them in the scope of their business, there is such a difference between carrying intelligence and goods that the public policy which imposes upon the common carrier the exceptional liability of insurers, is not applicable to them. Among the courts holding to this proposition are New York, Massachusetts, Ohio, Arkansas, California, Florida, Indiana, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Mis-

[2] *Southern Express Co.* v. *Ruth & Son*, 183 Ala. 493, 59 So. 538 (1912); *Southern Express Co.* v. *Van Meter*, 17 Fla. 783, 35 Am. Rep. 107 (1880); *Bruhl* v. *Coleman*, 113 Ga. 1102, 39 S. E. 481 (1901); *Sword* v. *Young*, 89 Tenn. 126, 14 S. W. 481 (1890).

[3] 69 Ind. App. 574, 122 N. E. 427 (1919).

[4] D. C., 157 Fed. 987 (1907), and affirmed in 164 Fed. 1022 (1908).

[5] See further on question of delivery to impostor, and application of the rule, 54 A. L. R. 1330, and notes following.

[6] *Gwynn* v. *Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460 (1904); *State* v. *Cumberland Tel. & Tel. Co.*, 114 Tenn. 194, 86 S. W. 390 (1905); *Southwestern Tel. & Tel. Co.* v. *Dohaher*, 102 Ark. 547, 144 S. W. 925 (1912).

[7] *State* v. *Cadwallader*, 172 Ind. 619, 87 N. E. 644 (1905); 1 Moore, CARRIERS, 94.

souri, Pennsylvania, South Carolina, Texas, Virginia, Wisconsin, and the Federal courts.[8] However, it is to be noticed that some of the states named above are among those holding that these corporations are liable as common carriers in some specific lines, as in carrying news, or as held in *Portland* v. *Western Union Telegraph Co.*,[9] that where the telegraph company, as part of its public employment, holds out as ready to carry from place to place as directed, within a city, notes, small packages, etc., for hire as a business, furnishing messengers at all times, except when otherwise engaged in delivering messages, in respect to such packages the telegraph company is a common carrier and ordinarily liable as such according to the principles of the common law. *Contra: Murray* v. *Postal Telegraph & Cable Co.*[10] Other states holding them common carriers only in some specific line of business are Arkansas, Indiana, and Kentucky; but this is held to be an exception to the general rule that they are not to be held liable as common carriers.

In the instant case the contract of the defendant company was to deliver to W. M. Steward on "positive identification." Hence, the extraordinary duty of the company arose out of this special contract and was the basis of the instruction of the lower court that the only issue was whether or not the defendant delivered to W. M. Steward being upheld by the higher court. On principle it seems that the plaintiff's action in the case should have been *ex contractu;* hence, it seems that the issue was properly narrowed down to performance or non-performance of the contract. This would make that part of the decision emphasizing the negligence of the defendant's servant in Houston in allowing a person whom she only casually knew to identify the recipient of the money as W. M. Steward mere *dictum,* and unnecessary to the decision of the case.

Apparently, the court felt constrained to reach the decision it did because of Section 195 of the Mississippi Constitution. If it had not been for this constitutional provision it is very probable that the court would have reached a different conclusion. But even in the face of this provision, when the case is considered in the light of the principles of Agency, the decision might be questioned. The evidence showed that the plaintiff had been in communication with someone in Houston; that he had received an offer from this person; that he had accepted this offer, and had selected the defendant as his agent for the purpose of performing the contract by delivering the money with which to purchase the shares in the oil company. In so doing he posted a telegraph to the person with whom he had been communicating as to the proposition, the impostor. The plaintiff did not in any way question the defendant's plea that it delivered the money to the intended recipient, the impostor, and person who was to purchase the stock for the plaintiff according to the foregoing transactions and communications. Hence, it seems reasonable to conclude that the defendant, as agent for the plaintiff for the purpose of performing the contract, carried out the duty imposed on it by delivering the money to the person with whom the plaintiff had contracted to buy for him some stock in the oil company. As agent for the plaintiff, the defendant could not be held responsible for the mistake or imposition on the plaintiff, nor for the fact that the plaintiff failed to find out if the person with whom he had contracted to buy the stock was the same person whom he supposed he was. Therefore, the fact that the defendant delivered the

[8] See 1 Moore, Carriers, 87-94.
[9] 75 Ore. 37, 146 Pac. 148 (1915).
[10] 210 Mass. 188, 96 N. E. 316 (1911).

money to the person intended by the plaintiff, regardless of the name, should have had some bearing on its liability to the plaintiff. On this theory of the case, it seems that the lower court could have been in error in refusing to instruct the jury on the point as to whether or not the defendant really delivered to the person with whom the plaintiff had contracted for the purchase of the stocks, and whom the plaintiff intended as the recipient of the money.

O. W. Phillips.